136

No. ~~1500~~

In the

Supreme Court of the United States

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN CAUSE NO. 11663, ENTITLED "BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., APPELLANTS, VERSUS TEXAS & PACIFIC RAILWAY COMPANY, ET AL., APPELLEES", AND SUPPORTING BRIEF.

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In the

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THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,
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v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioners, The Texas and Pacific Railway Company and Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, and not individually, respectfully request this Court to review on writ of certiorari the opinion and judgment of the United States Circuit Court of Appeals for the Fifth Circuit in Cause No. 11663, entitled "Brotherhood of Railroad Trainmen, et al., Appellants, versus Texas & Pacific Railway Company, et al., Appellees."

Another petition for a writ of certiorari in this cause has been filed by twenty-nine individual employees of The Texas and Pacific Railway Company, who were appellees in the Circuit Court and defendants in the District Court.

This case involves the construction and application of the Declaratory Judgment Act; it presents "important

questions affecting application and operation" of the Railway Labor Act, which should be resolved by this Court, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 713;* and it raises issues and questions "of importance in the orderly administration of the Railway Labor Act", *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147,* decided by this Court on January 13, 1947; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210; Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 194.* In each of those cases, this Court granted certiorari for the reason stated.

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

This is an action for a declaratory judgment brought by petitioners, The Texas and Pacific Railway Company and Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, and not individually, against the Brotherhood of Railroad Trainmen, its Rapides Lodge No. 856, and twenty-nine individual employees of The Texas and Pacific Railway Company (Complaint, R. 2; Amendment, R. 123.)

Plaintiffs alleged (R. 4) and all defendants admitted (R. 103-104, 110) that the matter in controversy is between citizens of different states and exceeds the sum or value of $3,000.00, exclusive of interest and costs. Plaintiffs also alleged (R. 4) that the matter in controversy arises under the Railway Labor Act. This was denied by the individual defendants (R. 111) but admitted by the Brotherhood and

its Rapides Lodge, respondents herein, who denied that the District Court had jurisdiction (R. 103).

The Brotherhood of Railroad Trainmen is the accredited representative of the yardmen employed by petitioners in their joint yards at Alexandria, Louisiana (Complaint, R. 5; Admitted, R. 104, 111). The Brotherhood was a party to an agreement dated June 2, 1927, which provided for an assignment of crews at Alexandria so that yardmen and certain other employees of the two companies might perform their appropriate share of the joint work. Since June 2, 1927, the joint yard work at Alexandria has been performed, and is now being performed, in accordance with that agreement (Complaint, R. 5; Admitted, R. 104, 111).

In June 1944, officers of the Brotherhood of Railroad Trainmen requested petitioners to amend and interpret the agreement of June 2, 1927, so that yard employees of the Missouri Pacific would receive a larger proportion of the joint yard work at Alexandria and yard employees of the Texas and Pacific would receive a smaller proportion of that work (Complaint, R. 6; Admitted, R. 104, 111).

Learning of the Brotherhood's proposal, twenty-three of the yard employees of the Texas and Pacific, individual defendants below, and six other persons including one A. C. Bujol, instituted an action on June 5, 1944, in the 19th Judicial District Court for East Baton Rouge Parish, Louisiana, numbered 21,579 and commonly styled "A. C. Bujol, et al. v. Missouri Pacific Railroad Company, et al." for the purpose of enjoining the Brotherhood of Railroad Trainmen, Missouri Pacific Railroad Company, and The Texas and Pacific Railway Company from making any

changes in the agreement of June 2, 1927 (Complaint, R. 7-8; Exhibit D to Complaint, R. 24-44; Admitted by Stipulation, R. 58.)

Although tacitly admitting that the Brotherhood of Railroad Trainmen is the accredited representative of the yardmen under the Railway Labor Act, plaintiffs in the Bujol case contended that the officers of the Brotherhood were without authority to make the proposed changes because (1) they were acting upon an invalid decision of the Board of Appeals of the Brotherhood, (2) the Board of Appeals had no jurisdiction of the controversy under the constitution of the Brotherhood, (3) plaintiffs were denied the right of appeal within the Brotherhood in violation of its constitution and by-laws, and (4) the proposal was the result of a political deal and collusion between officers, agents and representatives of the Brotherhood. It was also alleged that the invalid decision of the Board of Appeals, if given effect through the proposed changes in the agreement of June 2, 1927, would prejudice plaintiffs individually and collectively as to their working hours, rates of pay, working conditions, and seniority rights, including their right to earn a living (Complaint, R. 7; Exhibit D to Complaint, R. 24-44; Admitted by Stipulation, R. 58).

On June 26, 1944, one of the attorneys for the plaintiffs in the Bujol case addressed a letter to an agent of The Texas and Pacific Railway Company, one of the petitioners herein, reasserting the rights of those plaintiffs under the

agreement of June 2, 1927, declaring an intention to further prosecute their cause, and stating:

> "The purpose of this letter is to advise that petitioners intend, individually and collectively, to invoke all legal remedies available to them to enforce specific performance and legal adherence to the said contract, and in the alternative to sue in damages if the said contract is changed under said illegal decree" (Complaint, R. 8; Exhibit F to Complaint, R. 49-51; Admitted by Stipulation, R. 58).

By judgment rendered July 6, 1944, the Louisiana Court vacated a temporary restraining order previously issued and dismissed the suit because the Brotherhood of Railroad Trainmen, a necessary party, had not been properly served and was not before the Court (Complaint, R. 8; Exhibit E to Complaint, R. 45-48; Stipulation, R. 57-58). Following entry of the judgment, the attorneys for the plaintiffs addressed another letter to the agent of The Texas and Pacific Railway Company, stating that appeals would be prosecuted to the Supreme Court of Louisiana, and declaring the purpose of plaintiffs,—

> "to take any and all action available in this suit to enforce specific performance and legal adherence to the said contract (of June 2, 1927), and in the alternative to sue in damages if the said contract is changed under the said illegal decree of the Brotherhood of Railroad Trainmen" (Complaint, R. 8-9; Exhibit G to Complaint, R. 51-52; Admitted by Stipulation, R. 58).

Notwithstanding the charge of the individual employees, defendants below, that the officers of the Brotherhood were proceeding in violation of its constitution and by-laws, and despite the threats of those employees to prosecute damage

suits against petitioners if they changed the contract of June 2, 1927, the Brotherhood, standing on its asserted right as bargaining agent, persisted in its demand that such changes be made, asserting that petitioners are required by the Railway Labor Act to negotiate with the Brotherhood irrespective of the claimed lack of authority of the bargaining agent, or suffer a heavy penalty for their wilful failure so to do (Complaint, R. 9; Answers of the Brotherhood, R. 105, 121; Stipulation, R. 183-184).

Placed in this position of peril and insecurity, petitioners brought this action for declaratory judgment against the Brotherhood of Railroad Trainmen, its Rapides Lodge No. 856, and the twenty-nine complaining employees of The Texas and Pacific Railway Company, in an effort to ascertain (1) whether or not petitioners are required by the Railway Labor Act to negotiate and, if possible, to reach an agreement with the Brotherhood as to the changes desired by it in the agreement of June 2, 1927, notwithstanding the charges of the individual employees; and (2), if petitioners so negotiate and agree, whether or not they are liable for injuries or damages which may be sustained by any of the twenty-nine individual defendants by reason of such negotiation and agreement. Specifically, petitioners prayed that the Court declare:

> "(1) That plaintiffs are not required by law either to amend or to interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen;
>
> "(2) That plaintiffs are not required by law to confer, negotiate, or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning desire so to amend or interpret said contract of June 2, 1927, while the validity of said

Brotherhood's actions and/or the authority of its officers, agents, or representatives so to amend or interpret said contract are being challenged on the grounds and in the manner set forth in the foregoing bill of complaint;

"(3) That neither the Brotherhood of Railroad Trainmen or any person represented by it has or shall have any claim, demand, right, or cause of action whatsoever against plaintiffs, or either of them, for their refusal, jointly or severally, to amend or interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen, or for their refusal, jointly or severally, to confer, negotiate or bargain with any officer, agent or representative of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of said Brotherhood's actions and/or the authority of its officers, agents and representatives so to amend or interpret said contract are being challenged on the grounds and in the manner set forth herein.

"(4) In the alternative and in the event that the Court should hold that plaintiffs are required by law to amend and/or interpret said contract of June 2, 1927, as desired by the Brotherhood of Railroad Trainmen, or should the Court hold that plaintiffs are required by law to confer, negotiate or bargain with officers, agents and representatives of the Brotherhood of Railroad Trainmen, concerning its desire so to amend or interpret said contract of June 2, 1927, while the validity of the Brotherhood's actions and/or the authority of its officers, agents, and representatives so to amend or interpret said contract are being challenged on the grounds and in the manner hereinabove set forth, then, and in either of those events, plaintiffs pray the Court to declare that plaintiffs, by so amending and/or interpreting said contract, or by so conferring, negotiating, or bargaining with reference to said amendment or interpretation, are not and shall not become liable in any manner to the individual de-

> fendants herein, or to any of them, or to any other person, for any injury or damage which they or any of them may sustain by reason of said amendment, interpretation, conference, negotiation or bargaining" (Amendment to Complaint, R. 124-126).

The twenty-nine individual defendants filed motions to dismiss (R. 54-57), not here in issue, which were overruled (R. 101-102) after opinion (R. 62, 65-76) by the District Court.

The Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856 filed a motion to dismiss for lack of jurisdiction over the subject matter, asserting that:

> "The matter in controversy herein is not one of a justiciable nature, and consequently, not subject to judicial review, it being a labor dispute under the Railway Labor Act, 45 U. S. C. A. sec. 151 et seq., and one over which Congress has foreclosed resort to the Courts for enforcement of the claims asserted by plaintiffs" (R. 53).

This motion was overruled (R. 101-102) following an exhaustive opinion (R. 62, 76-101) by the District Court. After a painstaking analysis (R. 76-101), the District Court concluded (1) "that this controversy is not such 'a labor dispute' as the Railway Labor Act relegates to any national or regional board, nor does it come within the purview of the National Mediation Board or any other administrative agency provided by the Railway Labor Act" (R. 86); (2) that this case is not controlled by *General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co., et al., 320 U. S. 323* or by *Switchmen's*

Union of North America v. National Mediation Board, 320 U. S. 297 (R. 94); (3) that "the general jurisdiction of the Federal Courts is applicable, even to a 'labor dispute'—where the determination of that dispute is not otherwise provided for by the Railway Labor Act" (R. 99); (4) that this case is controlled by *Steele v. Louisville & N. R. Co., et al., 323 U. S. 192*, and by *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210* (R. 94-101); and (5) "We are so satisfied from the facts that the action for a declaratory judgment is permitted that we shall not discuss the question, nor cite the jurisprudence" (R. 83).

After a trial upon the merits, the District Court found that the order of the Board of Appeals of the Brotherhood of Railroad Trainmen (R. 185-194), under which the officers of the Brotherhood were proceeding in their efforts to change the agreement of June 2, 1927, was null and void because the Board of Appeals, under the constitution of the Brotherhood, had no jurisdiction of the controversy (R. 332, 335, 337, 338), and that the individual employees of The Texas and Pacific Railway Company, defendants below, "have been denied a right under the Constitution of the Brotherhood" (R. 338). Holding that these facts bring this case within the exception to the general rule that Courts will not interfere in the internal affairs of a labor union, the District Court recognized the legal principle that Courts will protect a union member's seniority rights " 'against action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts' " (R. 330-

331), and that " 'seniority rights secured to members of a brotherhood by its rules and its contract with a railroad will be respected and protected by the Courts against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution' " (R. 331). Accordingly, the District Court decreed, among other things,—

> "that the action taken by the Brotherhood of Railroad Trainmen, its officers, agents or representatives, to amend or interpret said contract of June 2, 1927, is contrary to and in violation of the constitution and by-laws of said Brotherhood and is null and void" (R. 340); and
>
> "that under the existing circumstances neither of said plaintiffs is required by law to confer, negotiate, bargain or treat with the Brotherhood of Railroad Trainmen, its officers, agents or representatives, concerning its or their desire to amend or interpret said contract of June 2, 1927" (R. 340).

Without reaching the merits (R. 355), the Circuit Court reversed the judgment of the District Court and remanded the cause with directions to dismiss the complaint (R. 360) because "the complaint presented no justiciable controversy" and "it was fundamental error not to grant the motion to dismiss" (R. 355) "in light of the controlling authorities" (R. 358), namely: *Brotherhood of Locomotive Engineers v. M. K. & T. R. Co., 320 U. S. 323; Switchmen's Union v. National Mediation, 320 U. S. 297; Brotherhood of Railroad Trainmen v. Toledo, 321 U. S. 50;* and the decision of the Circuit Court in *Bradley Lumber Co. v. N. L. R. B., 84 Fed. (2) 97* (R. 353-354). Stating its reasons for these conclusions "in the briefest compass" (R.

prove a justiciable controversy between themselves and the twenty-nine individual defendants; hence, at most, the Circuit Court should have limited its order of dismissal to the cause of action against the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856, and the Circuit Court should have remanded this cause to the District Court with directions to enter a declaratory judgment against the twenty-nine individual defendants, in accordance with its opinon.

JURISDICTIONAL STATEMENT

This Court is authorized by Section 240 of the Judicial Code, as amended, (36 Stat. 1157, 43 Stat. 938; 28 U. S. C. A. sec. 347) to review on certiorari the judgment of the Circuit Court. That statute reads in part as follows:

> "In any case, civil or criminal, in a circuit court of appeals, * * * it shall be competent for the Supreme Court of the United States, upon petition of any party thereto, * * * to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal" [28 U. S. C. A. sec. 347(a)].

The judgment of the Circuit Court was rendered on February 5, 1947. A timely petition for rehearing (R. 365-371) was denied by that Court on March 19, 1947, and this petition for a writ of certiorari will be filed "within three months" thereafter, as required by Section 8 of the Act approved February 13, 1925 (43 Stat. 940; 28 U. S. C. A. sec. 350) as construed by this Court in *Gypsy Oil Company v. Leo Bennett Escoe, a Minor, by O. W. Steph-*

ens, Guardian, 275 U. S. 498-499, and *Department of Banking of Nebraska, Receiver v. Pink, Superintendent of Insurance of the State of New York, 317 U. S. 264, 266.*

As a part of this jurisdictional statement, petitioners adopt the foregoing summary and short statement of the matters involved (pages 2-12). As therein shown, this is an action for a declaratory judgment; it is a controversy between citizens of different states; it exceeds the sum or value of $3,000.00 exclusive of interest and costs; it arises under a law of the United States [Judicial Code, sec. 24; 36 Stat. 1091; 28 U. S. C. A. sec. 41(1)]; and it arises under a law regulating commerce [Judicial Code, sec. 24, par. 8, as amended; 36 Stat. 1092, 38 Stat. 219; 28 U. S. C. A. sec. 41(8)].

This case presents "important questions affecting application and operation" of the Railway Labor Act (48 Stat. 1186; 45 U. S. C. A. sec. 152), which should be resolved by this Court, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 713;* and it raises issues and questions "of importance in the orderly administration of the Railway Labor Act", *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147,* decided by this Court on January 13, 1947; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210; Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 194.* In each of those cases, this Court granted certiorari for the reason stated.

The Circuit Court misinterpreted and misapplied the decisions of this Court in *General Committee v. M.-K.-T. R.*

Co., 320 U. S. 323; Switchmen's Union v. Board, 320 U
297; and *Brotherhood of Railroad Trainmen v. Toledo*
& W. R. Co., 321 U. S. 50.

The Circuit Court misinterpreted and refused to ap
and its opinion and judgment are in conflict with, the
cisions of this Court in *The Order of Railway Conduc*
of America, et al. v. O. E. Swan, et al., 15 Law Week 4
decided by this Court on January 13, 1947; *Elgin, J. &*
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Locomotive Firemen and Enginemen, 323 U. S. 210;
Steele v. Louisville & N. R. Co., et al., 323 U. S. 192.

The Circuit Court refused to apply and give effec
the Declaratory Judgment Act (Judicial Code, sec. 2
as amended; 48 Stat. 955, 49 Stat. 1027; 28 U. S. C
sec. 400) as construed and applied by this Court in *A*
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v. Wallace, 306 U. S. 1, 9; Maryland Casualty Co. v. Pa
Co., 312 U. S. 270, 272-274; Altvater v. Freeman, 31
S. 359, 363-365; and *Tennessee Coal Co. v. Muscoda L*
321 U. S. 590, 592-593, and the opinion and judgmer
the Circuit Court are in conflict with those decisions.

QUESTIONS PRESENTED

The following questions are presented by the record
opinions in this case:

1. Are officers of a labor union, a bargaining a
under the Railway Labor Act, required to comply wit
union's constitution and by-laws as a condition prec
to their right under the Act to negotiate contracts w
railroad company?

2. Is a railroad company required by the Railway Labor Act to confer, negotiate, bargain or treat with, and if possible to reach an agreement with, officers of a labor union, a bargaining agent under the Act, after being notified by employees who would be injuriously affected that the officers of the union are proceeding in violation of its constitution and by-laws and that such employees will sue the railroad company for damages should such agreement be made?

3. Does the Railway Labor Act require a railroad company to confer, negotiate, bargain or treat with, and if possible to reach an agreement with, officers of a labor union, a bargaining agent under the Act, after a United States District Court has found that such officers are proceeding in violation of the union's constitution and by-laws and that employees who would be injuriously affected have been denied a right under the union's constitution?

4. If the answer to question 2 or 3 is "Yes", does the railroad company become liable in damages to its employees who are injured by such conferring, negotiating, bargaining, treating, and the agreement resulting therefrom?

5. If the answer to question 2 or 3 is "No", is the railroad company subject to any penalty under the Railway Labor Act, and is it liable in damages to the labor union or to any person represented by it, or to any employee who might be injured by the failure or refusal of the railroad company to confer, negotiate, bargain or treat with, and if possible to reach an agreement with, the officers of the labor union?

6. Does a District Court of the United States have jurisdiction and authority to answer questions numbered 1 to 5, inclusive, and to enter a judgment declaring the respective rights, obligations, and legal relations of the parties in an action for a declaratory judgment between citizens of different states where the amount in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs?

7. Did the District Court have jurisdiction of this cause of action and was it authorized, as it did, to enter a declaratory judgment?

8. Does the complaint and record in this case disclose a justiciable controversy between petitioners and defendants Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856?

9. Does the complaint and record in this case disclose a justiciable controversy between petitioners and the twenty-nine individual defendants?

10. Is the decision in this case controlled by *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323; Switchmen's Union v. National Mediation, 320 U. S. 297; Brotherhood of Railroad Trainmen v. Toledo, 321 U. S. 50;* and *Bradley Lumber Co. v. N. L. R. B., 84 Fed. (2d) 97*, as stated by the Circuit Court of Appeals?

11. Is this case controlled by the principles announced by this Court in *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146*, decided January 13, 1947; *Elgin, J. & E. R. Co. v. Burley,*

325 U. S. 711; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210; and *Steele v. Louisville & N. R. Co., et al., 323 U. S. 192?*

12. Did the Circuit Court err in failing and refusing to apply and give effect to the Declaratory Judgment Act (Judicial Code. sec. 274d, as amended; 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. A. sec. 400) as construed and applied by this Court in *Aetna Life Ins. Co. v. Haworth, 300 U. S. 227, 239-241; Currin v. Wallace, 306 U. S. 1, 9; Maryland Casualty Co. v. Pacific Co., 312 U. S. 270, 272-274; Altvater v. Freeman, 319 U. S. 359, 363-365;* and *Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, 592-593?*

13. Did the Circuit Court err in ordering a dismissal of the complaint on the ground that petitioners neither alleged nor proved a justiciable controversy between themselves and the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856?

14. Having based its order of dismissal on the failure of petitioners to allege or prove a justiciable controversy between themselves and the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856 (R. 358), did the Circuit Court err in ordering a dismissal of the complaint as to the cause of action asserted by petitioners against the twenty-nine individual defendants?

15. Having declared that petitioners are under a statutory duty to negotiate with the Brotherhood of Railroad Trainmen and that neither negotiation nor agreement with it can therefore make petitioners liable to the individual

defendants (R. 359), did the Circuit Court err in not entering, or in not remanding this cause to the District Court with directions to enter, a judgment in accordance with that declaration?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT

Petitioners respectfully submit that this application for a writ of certiorari should be granted for each of the following reasons:

1. This case presents "important questions affecting application and operation" of the Railway Labor Act which should be resolved by this Court, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 713.*

2. The issues and questions raised by this case are "of importance in the orderly administration of the Railway Labor Act", *The Order of Railway Conductors of America, et al., v. O. E. Swan, et al., 15 Law Week 4146, 4147,* decided by this Court on January 13, 1947; *Steele v. Louisville & N. R. Co., 323 U. S. 192, 194; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210.*

3. It is now a matter of common knowledge that employees on numerous railroads are challenging the right of officers of labor unions, accredited respresentatives under the Railway Labor Act, to make, amend or terminate contracts with railroad companies on the ground that such officers are acting in violation of the unions' constitutions and by-laws. In many instances, such as this, those employees are threatening to bring damage suits against the

railroad companies if they make, amend or terminate such contracts as requested by the officers of the unions. On the other hand, the union officers are insisting that the railroad companies are required by the Railway Labor Act to confer, negotiate, bargain or treat with them, and if possible reach an agreement, notwithstanding such charges by the individual members of the union, or suffer penalties for their wilfull failure so to do. This creates confusion, doubt, uncertainty and delay in the orderly administration of the Railway Labor Act and places the railroad companies in positions of peril and insecurity. A writ of certiorari should be granted in this case so that this Court may declare the respective rights, obligations, and legal relations of the parties under the Act in respect to these matters and forever set such questions at rest.

4. The Circuit Court misinterpreted and misapplied the decisions of this Court in *General Committee v. M.-K.-T. R. Co., 320 U. S. 323; Switchmen's Union v. Board, 320 U. S. 297;* and *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50.*

5. The Circuit Court misinterpreted and refused to apply, and its opinion and judgment are in conflict with, the decisions of this Court in *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week, 4146,* decided by this Court on January 13, 1947; *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210;* and *Steele v. Louisville & N. R. Co., et al., 323 U. S. 192.*

6. The Circuit Court refused to apply and give effect to the Declaratory Judgment Act (Judicial Code, sec. 274d, as amended; 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. A. sec. 400) as construed and applied by this Court in *Aetna Life Insurance Co. v. Haworth, 300 U. S. 227, 239-241; Currin v. Wallace, 306 U. S. 1, 9; Maryland Casualty Co. v. Pacific Co., 312 U. S. 270, 272-274; Altvater v. Freeman, 319 U. S. 359, 363-365;* and *Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590, 592-593;* and the opinion and judgment of the Circuit Court are in conflict with those decisions.

7. The Circuit Court treated this action solely as one between petitioners and the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856, finding that no justiciable controversy was alleged or proved between petitioners and those appealing defendants (R. 358). Without any finding to support its action, the Circuit Court erroneously ordered a dismissal of the complaint against the twenty-nine individual defendants. Certiorari should be granted to correct this error.

WHEREFORE, petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the case on its docket numbered 11663, entitled "Brotherhood of Railroad Trainmen, et al., Appellants, versus Texas & Pacific Railway Company, et al., Appellees", to the end that said cause may be reviewed and determined by this Court as provided by the Statutes

of the United States; that the judgment of said Circuit Court be reversed; and for such other and further relief as this Court may deem proper.

Dated June 14, 1947.

Respectfully submitted,

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Attorneys for Petitioner, Guy A. Thompson, as Trustee of Missouri Pacific Railroad Company, Debtor, and not individually.

No.....

In the

Supreme Court of the United States

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

---

the Honorable, the Supreme Court of the United States:

As permitted by Rule 38, petitioners attach this sup-rting brief to their petition for writ of certiorari.

OPINIONS IN THE COURTS BELOW

The opinion of the District Court on motions to dismiss . 62-101) is reported in 60 F. Supp. 263-281.

The final opinion of the District Court, on the merits of e case (R. 329-339), is reported in 63 F. Supp. 640-644.

The opinion of the Circuit Court (R. 349-359) is re-rted in 159 F. 2d 822-828 (Pamphlet Advance Sheet No. dated April 14, 1947).

GROUNDS OF JURISDICTION

Petitioners adopt, as their grounds of jurisdiction, the jurisdictional statement on pages 12 to 14, inclusive, of the foregoing petition for a writ of certiorari.

STATEMENT OF THE CASE

Petitioners adopt, as their statement of the case, the summary and short statement of the matter involved on pages 2 to 12, inclusive, of the foregoing petition for a writ of certiorari.

SPECIFICATIONS OF ASSIGNED ERRORS

Petitioners respectfully submit that the Circuit Court committed the following errors:

1. The Circuit Court erred in entering a judgment (R. 360) reversing the judgment of the District Court and remanding this cause with directions to dismiss the complaint.

2. The Circuit Court erred in entering a judgment (R. 360) which directed the District Court to dismiss the complaint against the twenty-nine individual defendants.

3. The Circuit Court erred in holding "that the complaint presented no justiciable controversy; that it was fundamental error not to grant the motion to dismiss; and that the judgment must be reversed and the cause remanded with directions to dismiss the suit" (R. 355).

4. The Circuit Court erred in holding that petitioners, plaintiffs below, neither alleged nor proved a justiciable controversy between themselves and the Brotherhood of

Railroad Trainmen and its Rapides Lodge No. 856 (R. 358).

5. The Circuit Court erred in failing or refusing to find and hold that petitioners both alleged and proved a justiciable controversy between themselves and the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856.

6. The Circuit Court erred in failing or refusing to find and hold that petitioners both alleged and proved a justiciable controversy between themselves and the twenty-nine individual defendants.

7. The Circuit Court erred in holding that petitioners, plaintiffs below, "do not allege any fact which shows that they are justiciably concerned in the internal dispute between the members and the Brotherhood" (R. 358-359).

8. The Circuit Court erred in holding, in effect, that this case can and should be settled under and in accordance with the Railway Labor Act.

9. The Circuit Court misinterpreted and misapplied the decisions of this Court in *General Committee v. M.-K.-T. R. Co., 320 U. S. 323; Switchmen's Union v. Board, 320 U. S. 297;* and *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50;* and the Circuit Court erred in holding that "this case comes squarely under the general rule" announced in those cases (R. 356).

10. The Circuit Court misinterpreted and refused to apply the decisions of this Court in *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146,* decided by this Court on January 13,

ously refused to give effect to the Declaratory Judgment Act which is intended to afford relief against peril and insecurity, *Altvater v. Freeman, 319 U. S. 359, 365,* to remove uncertainty, to avoid multiplicity of suits, to afford a speedy and inexpensive method of adjudication, to avoid accrual of avoidable damages, and to afford the parties an early adjudication without waiting until their adversaries see fit to begin suit after damages have accrued.

14. Having declared that "the carriers (petitioners) are under a statutory duty to negotiate with the Brotherhood" and that "neither negotiation nor an agreement with them can therefore make the carriers liable" to the twenty-nine individual defendants (R. 359), the Circuit Court erred in failing or refusing to enter a declaratory judgment to that effect.

SUMMARY OF ARGUMENT

These propositions are advanced in the argument which follows:

1. Jurisdiction of this cause is not excluded by the Railway Labor Act, and the cases cited by the Circuit Court do not support its conclusion that the instant case presents no "justiciable controversy".

2. The Courts will interpret the Railway Labor Act and will determine whether or not Congress, by its command that railroad companies confer, negotiate, bargain or treat with, and if possible reach an agreement with, the accredited representative of employees, intended that a railroad company do so after being put on notice by its employees who would be injured thereby that the officers of an accred-

ited union are proceeding in violation of the union's constitution and by-laws and that such injured employees will sue said railroad company for damages should such agreement be made. And the Courts will determine whether or not such liability exists.

3. Petitioners have no administrative remedy. Neither the National Railroad Adjustment Board nor the National Mediation Board nor any other agency is authorized by the Railway Labor Act to entertain or decide the questions presented in preceding paragraph 2 or to make any award or order in respect thereto.

4. Courts will determine whether a labor union is proceeding lawfully under the Railway Labor Act and Courts will invalidate acts of the union and its officers which are in violation of the constitution and by-laws of the union.

5. Petitioners are entitled to a declaratory judgment. The Declaratory Judgment Act was intended to afford relief in cases such as this and avoid the procedure prescribed by the Circuit Court.

ARGUMENT

The Circuit Court ordered a dismissal of the complaint (R. 360) after finding that "this case comes squarely under the general rule" stated in the cases "relied on by appellants" (R. 356), namely: *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323; Switchmen's Union v. National Mediation, 320 U. S. 297; Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50;* and *Bradley Lumber Co. v. N. L. R. B., 84 Fed. (2) 97.*

In light of these "controlling authorities" (R. 358), the Circuit Court concluded that "the complaint presented no justiciable controversy" (R. 355), and that "no justiciable controversy between the railroads and the appealing defendants is alleged or proven" (R. 358).

Had the Circuit Court not felt bound by those decisions, it doubtless would have concluded, as it did in *Oil Workers Inter. Union, etc. v. Texoma Nat. Gas Co., 146 Fed. (2) 62*, certiorari denied, *325 U. S. 872*, rehearing denied, *325 U. S. 893*, that a declaratory judgment action was proper. In that case, the Circuit Court said:

> "The Declaratory Judgment Act should be liberally construed, Mississippi Power & Light Co. v. City of Jackson, 5 Cir., 116 F. 2d 924, certiorari denied 312 U. S. 698, 61 S. Ct. 741, 85 L. Ed. 1133; and where a justiciable controversy exists between parties who are citizens of different states with regard to rights having a value in excess of $3,000, as here, the United States District Courts are vested with jurisdiction. The court below found that the controversy between the parties related to their legal rights and liabilities under their contract; that the parties had taken adverse positions with respect to their respective rights and obligations; that, therefore, a justiciable controversy existed, appropriate for judicial determination under the Declaratory Judgment Act. We agree. An employer may establish the seniority rights of an employee in dispute with other employees, as well as general rights which their contract relationship establishes, without waiting to be sued for breach or for damages or for specific performance, and thus secure an 'interpretation of the contract during its actual operation' and stabilize an 'uncertain and disputed relation'" (page 65).

The cases cited by the Circuit Court are not controlling and they do not sustain its dismissal order.

In *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50*, this Court held that the federal courts could not enjoin strike violence on the Toledo, Peoria & Western Railroad because that company had refused to arbitrate disputes relating to rates of pay and working conditions, as provided in the Railway Labor Act. No such issue is involved in this case.

In *Bradley Lumber Co. v. National Labor Relations Board, 84 Fed. (2) 97*, it was held that a federal court could not enjoin the taking of testimony by a Regional Director for the National Labor Relations Board, and that the Declaratory Judgment Act conferred no greater power "to stop or interfere with administrative proceedings" or extend equity jurisdiction to "controversies which have not yet reached the judicial stage". No such issues are involved in the instant case.

This Court has definitely limited the scope of *General Committee v. M.-K.-T. R. Co., 320 U. S. 323*, and *Switchmen's Union v. Board, 320 U. S. 297*, to "a jurisdictional dispute, determinable under the administrative scheme set up by the (Railway Labor) Act * * * or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitration", to questions of "who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board", to "differences as to the interpretation of the contract which by the Act are

committed to the jurisdiction of the Railroad Adjustment Board", *Steele v. Louisville & N. R. Co., 323 U. S. 192, 204-205; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 213;* and to "an administrative determination which Congress has made final and beyond the realm of judicial scrutiny", *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147*, decided January 13, 1947. None of those elements are present in the case now before this Court. And, certainly those cases do not preclude judicial review where, as here, "the issue is primarily one of statutory interpretation", "the problem is to determine what Congress meant * * *", *Swan case*, supra; and the Courts are called upon to declare whether or not petitioners, by complying with the Court's interpretation of the Act, become liable in damages to those who may be injured thereby. These are questions essentially for the Courts:

> "The judicial department of every government is the rightful expositor of its laws * * *", *Bank of Hamilton v. Dudley, 2 Peters 317, 336; 27 U. S. 492, 524.*
>
> "* * * the judicial department of every government, where such department exists, is the appropriate organ for construing the legislative acts of that government", *Elmendorf v. Taylor, 10 Wheaton 67, 70; 23 U. S. 152, 159.*
>
> "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function. This duty requires one body of public servants, the judges, to construe the meaning of what another body, the legislators, has said", *United States v. American Trucking Ass'ns, 310 U. S. 534, 544.*

Only the Courts can say whether or not Congress, by its command that railroad companies confer, negotiate, bargain or treat with, and if possible reach an agreement with, the accredited representatives of employees under the Railway Labor Act (48 Stat. 1186; 45 U. S. C. A. sec. 152), intended that a railroad company should do so after being put on notice by its employees who would be injured thereby that the officers of an accredited union representative are proceeding in violation of the union's constitution and by-laws and that such injured employees will sue said railroad company for damages should such agreement be made. And only the Courts can say whether or not such liability exists.

There is nothing in the Railway Labor Act which authorizes the National Railroad Adjustment Board, or the National Mediation Board, or any other administrative agency, to pass upon these questions, or to bind the parties if they did. According to its purpose clause, the Railway Labor Act is intended to provide for the prompt and orderly settlement of "all disputes concerning rates of pay, rules, or working conditions" and "all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules or working conditions" (48 Stat. 1186; 45 U. S. C. A. sec. 151a); and the jurisdiction of the National Railroad Adjustment Board and the National Mediation Board is limited to such disputes between a railroad company and its employees [48 Stat. 1189, 1195; 45 U. S. C. A. sec. 153(i) and sec. 155 First]. No such dispute is present in the instant case. The questions at issue are the authority of the bargaining agent

and the liability, if any, of the railroad company resulting from its agreements with that agent.

The authority of the bargaining agent was at issue in *Steele v. Louisville & N. R. Co., et al., 323 U. S. 192; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210;* and *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711;* and in each of those cases this Court granted certiorari.

In the *Steele case*, the Supreme Court of Alabama held that the railroad company was required to make the agreement there under attack because the Railway Labor Act "places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft" and "imposes heavy criminal penalties for willful failure to comply with its command" (323 U. S. 197). Disagreeing, this Court recognized that the Act creates "the relationship of principal and agent between the members of the craft and the Brotherhood" (323 U. S. 198), and invalidated the agreement because the Brotherhood, in violation of its statutory duty, had contracted against a minority whom it was required to represent (323 U. S. 198-203). The *Tunstall case* is to the same effect (323 U. S. 211-212).

In the *Burley case*, certain employees of the Elgin, J. & E. Ry. Co., among other things, challenged the authority of a union representative under the Railway Labor Act and its officers to release their individual claims or submit

them to the National Railroad Adjustment Board (325 U. S. 718). As stated by this Court:

> "They relied upon provisions of the Brotherhood's constitution and rules, of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board 'without specific authority to do so granted by the individual members themselves'; and denied that such authority in either respect had been given" (325 U. S. 718).

Holding that "the collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose" (325 U. S. 728), this Court remanded the cause for a determination of the "crucial issue" of whether the employees "had authorized the Brotherhood in any legally sufficient manner to represent them" (325 U. S. 748). On rehearing, this Court adhered to its former decision and reëmphasized the right of the complaining employees to challenge the lack of authority of the bargaining agent in the courts—"the forum where such issues properly are triable" (327 U. S. 667).

In addition to the *Steele*, *Tunstall*, and *Burley cases*, petitioners are confronted with the principles of law, quoted by the District Court (R. 330-331), to the effect that, contrary to the general rule that Courts will not interfere with the internal affairs of a labor union, they will protect a union member's seniority rights against "action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts", and that "the seniority rights se-

cured to members of a brotherhood by its rules and its contracts with a railroad will be respected and protected by the Courts against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution", *142 A. L. R. 1067.*

It is clear from the foregoing authorities and the facts in this case that petitioners are placed in a position of "peril and insecurity" against which the Declaratory Judgment Act should "afford relief", *Altvater v. Freeman, 319 U. S. 350, 365.* The Act was so used in the *Altvater case* and it served the same purpose in *Aetna Life Ins. Co. v. Haworth, 300 U. S. 227; Currin v. Wallace, 306 U. S. 1; Maryland Casualty Co. v. Pacific Co., 312 U. S. 270;* and *Tennessee Coal Co. v. Muscoda Local, 321 U. S. 590.*

The District Court entered a declaratory judgment (R. 339-341), stating:

> "We are so satisfied from the facts that the action for a declaratory judgment is permitted that we shall not discuss the question, nor cite the jurisprudence" (R. 83).

But the Circuit Court reversed, remanded, and ordered a dismissal (R. 360) because it found that no "justiciable controversy" was alleged or proved (R. 360) "in light of the controlling authorities" (R. 358), principally *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323,* and *Switchmen's Union v. National Mediation, 320 U. S. 297.* As we have heretofore shown, the issues in those cases are in nowise comparable to the issues in this case and those decisions, therefore, do not support the conclusion of the Circuit Court that no justiciable controversy

has been alleged or proved in the instant case. The Circuit Court of Appeals for the Fourth Circuit made the same error in *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 140 F. 2d 35*, and this Court reversed, holding that "the Railway Labor Act itself does not exclude the petitioner's cause of action from the consideration of the federal courts", *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 213.*

With this element of the case removed, we need look only to the Declaratory Judgment Act, and the decisions of this Court construing it, to determine whether or not petitioners are entitled to a declaratory judgment. That Act reads in part as follows:

> "In cases of actual controversy * * * the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such" (Judicial Code, sec. 274d, as amended; 48 Stat. 955, 49 Stat. 1027; 28 U. S. C. A. sec. 400).

The term "actual controversy", as used in the Declaratory Judgment Act, has been thus defined by this Court.

Aetna Life Ins. Co. v. Haworth, 300 U. S. 227:

> "The Constitution limits the exercise of the judicial power to 'cases' and 'controversies.' 'The term "controversies," if distinguishable at all from "cases," is so in

that it is less comprehensive than the latter, and includes only suits of a civil nature.' Per Mr. Justice Field in In re Pacific Railway Comm'n, 32 Fed. 241, 255, citing Chisholm v. Georgia, 2 Dall. 419, 431, 432. See Muskrat v. United States, 219 U. S. 346, 356, 357; Old Colony Trust Co. v. Commissioner, 279 U. S. 716, 723, 724. The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. * * *" (pages 239-240).

* * * * *

"A 'controversy' in this sense must be one that is appropriate for judicial determination. Osborn v. United States Bank, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. United States v. Alaska S. S. Co., 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. South Spring Gold Co. v. Amador Gold Co., 145 U. S. 300, 301; Fairchild v. Hughes, 258 U. S. 126, 129; Massachusetts v. Mellon, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised * * *" (pages 240-241).

Maryland Casualty Co. v. Pacific Co., 312 U. S. 270:

> "The difference between an abstract question and a 'controversy' contemplated by the Declaratory Judgment Act is necessarily one of degree, and it would be difficult, if it would be possible, to fashion a precise test for determining in every case whether there is such a controversy. Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (page 273).

Without repeating, we respectfully submit that the summary and short statement of the matter involved on pages 2 to 12, inclusive, of the foregoing petition for a writ of certiorari clearly disclose an "actual controversy", as defined by this Court, and that petitioners are entitled to a declaratory judgment which the Circuit Court almost but did not quite grant when it declared:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable" (R. 359).

If that is what Congress intended, then the Circuit Court should have said so in a judgment which would have been binding upon all the parties and which would have protected petitioners from the damage suits threatened by the

twenty-nine individual defendants. Instead of affording petitioners "relief against such peril and insecurity", *Altvater v. Freeman, 319 U. S. 359, 365*, the Circuit Court adds thereto by thus advising the twenty-nine individual defendants:

> "If, the negotition completed, any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent, it will not be binding on them or on the carriers, and they can, as Steele and Tunstall did, obtain relief from it" (R. 359).

It thus appears that the Circuit Court would have petitioners and the Brotherhood of Railroad Trainmen negotiate an agreement which inevitably would be subjected to attack in subsequent litigation because the District Court has already found that the order of the Board of Appeals of the Brotherhood of Railroad Trainmen (R. 185-194), under which the officers of the Brotherhood are proceeding, is null and void because the Board of Appeals, under the constitution of the Brotherhood, had no jurisdiction of the controversy (R. 332, 335, 337, 338); that the individual employees of The Texas and Pacific Railway Company, defendants below, "have been denied a right under the Constitution of the Brotherhood" (R. 338); and that the action taken by the Brotherhood of Railroad Trainmen, its of-

ficers, agents or representatives, "is contrary to and in violation of the constitution and by-laws of said Brotherhood and is null and void" (Judgment, R. 340). This course of procedure would deny the relief which "it was the function of the Declaratory Judgment Act to afford", *Altvater v. Freeman, 319 U. S. 359, 365* [citing *S. Rep. No. 1005, 73d Cong., 2d Sess., pp. 2-3;* and *Borchard, Declaratory Judgments (2d ed.) pp. 927, et seq.*] and it would frustrate the very purpose of the Act, which was intended to avoid a multiplicity of suits, *Maryland Casualty Co. v. Faulkner, 126 F. 2d 178*, "remove uncertainty and insecurity", "afford a speedy and inexpensive method of adjudication", *Aetna Casualty & Surety Co. v. Quarles, 92 F. 2d 321, 325*, "avoid accrual of avoidable damages", afford parties "an early adjudication without waiting" until their adversaries "should see fit to begin suit, after damage had accrued", *Milwaukee Gas Specialty Co. v. Mercoid Corporation, 104 F. 2d 589, 592;* and, according to the Circuit Court in another case, afford an employer the opportunity to establish the rights of its employees "without waiting to be sued for breach or for damages or for specific performance" and thus "stabilize an 'uncertain and disputed relation' ", *Oil Workers Inter. Union, etc. v. Texoma Nat. Gas Co., 146 F. 2d 62, 65*, certiorari denied, *325 U. S. 872*, rehearing denied, *325 U. S. 893*.

In the picturesque language of a proponent of the Declaratory Judgment Act, the Circuit Court would have the parties "take a step in the dark and then turn on the light" to see if they "have stepped in a hole", while the Act contemplates that the parties "turn on the light and then take the step", *Senate Report No. 1005* (to accompany S. 588), *73d Congress, 2d Session* (page 5).

Petitioners attempted to "turn on the light" by this action for a declaratory judgment which the Circuit Court erroneously refused to grant either against the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856, or against the twenty-nine individual defendants.

WHEREFORE, petitioners pray, as in their foregoing petition, that a writ of certiorari, issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the case on its docket numbered 11663, entitled "Brotherhood of Railroad Trainmen, et al., Appellants, versus Texas & Pacific Railway Company, et al., Appellees", to the end that said cause may be reviewed and determined by this Court as provided by the Statutes of the United States; that the judgment of said Circuit Court be reversed; and for

such other and further relief as this Court may deem proper.

Dated June 14, 1947.

Respectfully submitted,

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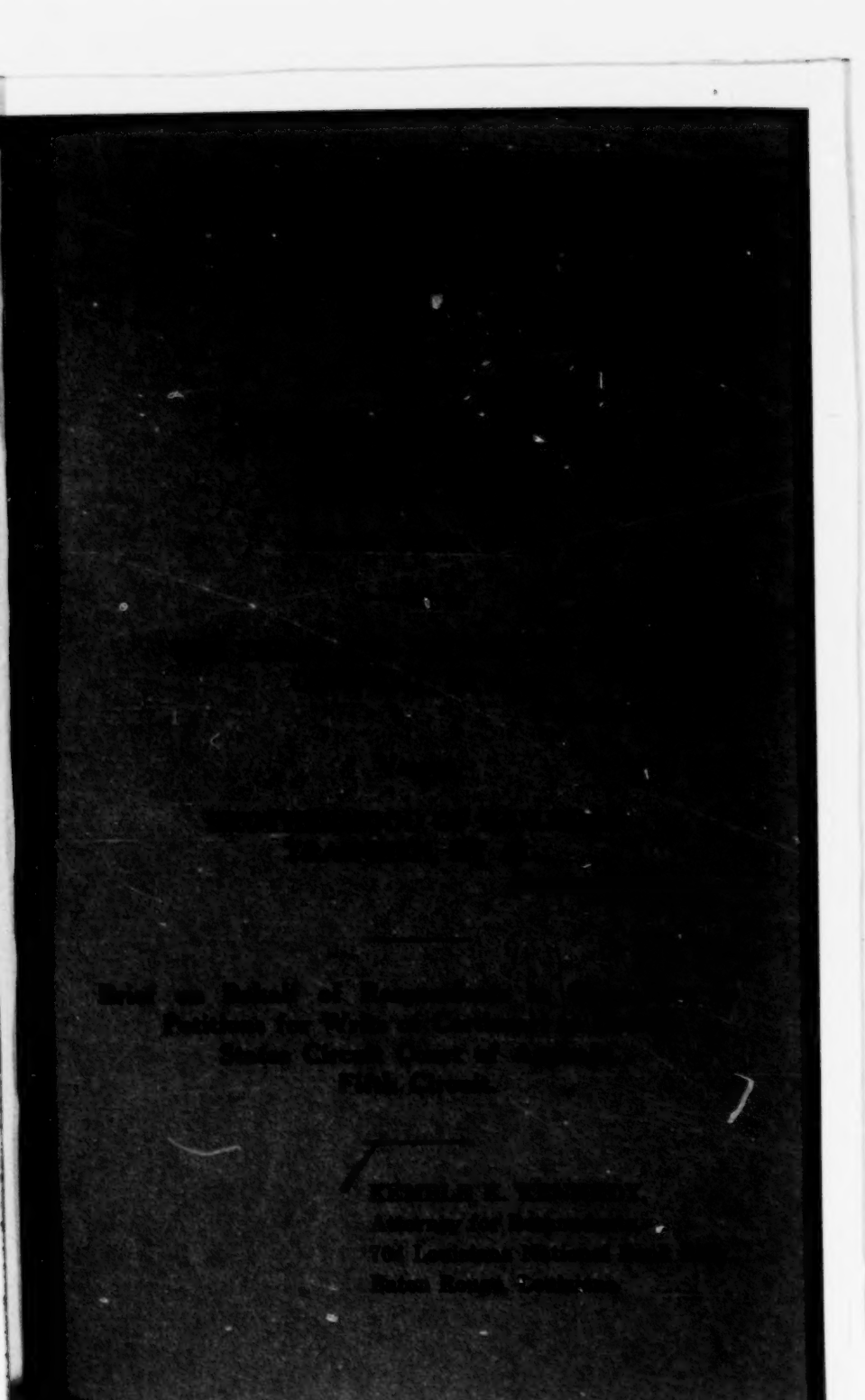

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Nos. 1500, 1501

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1946

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

Versus

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

Brief on Behalf of Respondents in Opposition to Petitions for Writs of Certiorari

---

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

Notwithstanding the fact that the petitioners have supplied a statement of the case, which is generally correct, a more detailed recitation of the facts is deemed desirable to show the correctness of the decision of the United States Circuit Court of Appeals, Fifth Circuit.

STATEMENT OF FACTS

During the year 1926, the Texas and Pacific Railway Company and the Missouri Pacific Railroad Company consolidated their facilities covering the manning of yard and hostler service in the Alexandria Terminal, Alexandria, Louisiana, and made all of these facilities one common interchangeable yard. The interests of the two sets of employees for the two carriers, represented by the Brotherhood of Locomotive Engineers, the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen, became involved. A controversy followed. The respective committees of the three labor organizations having jurisdiction over the terminal facilities, being unable to agree as to the disposition of the issues, invoked the assistance of national officers. An agreement was reached in St. Louis on June 2, 1927, (R. 12-15) and made effective June 20, 1927, jointly executed by a duly authorized representative of each organization, whereby the work in the terminal was apportioned between the employees of the two railroads based upon the ratio of business done at that time by the two carriers at the joint terminal.

Thereafter, J. H. Bromley and R. L. Hickman, both members of Rapides Lodge No. 856 of the Brotherhood of Railroad Trainmen, requested a change in apportionment of work in the Alexandria Terminal on account of the increased ratio of business handled by the Missouri Pacific Railroad in and out of the Alex-

andria Terminal over the ratio of business done by the Texas and Pacific. The request for a change in the apportionment of work was denied by a decision of the chief executives of the three national brotherhoods. An appeal was perfected to the Board of Appeals of the Brotherhood of Railroad Trainmen, and on November 16, 1943, (R. 185-194) the said Board of Appeals reversed the decision of the chief executives, and among other things held:

> "The fact that Grand Lodge officers of the three organizations were assigned with general committees of the M. P. and T. & P. Railways as a result of contention of the M. P. men that increase in their proportion of work in the terminal justified a change in the percentage established in 1927 indicates to this board that the Chief Executives recognized that a change in the 1927 percentage figures could be made if such a change was justified. Further, the Board cannot agree that fluctuations of 'ten percent in 1940, twelve percent in 1941 and twenty percent for 7 months in 1942' indicating a progressive increased disparity between the business handled by the two properties, 'does not constitute a change in conditions under the law and policy of our organization,' as held by Vice President Smith and his associate officers."

The Brotherhood of Railroad Trainmen has been making efforts to place into execution the decision of the Board of Appeals since the date of its rendition. The Brotherhood of Railroad Trainmen was tem-

porarily restrained by an order of the 19th Judicial District Court, State of Louisiana, in Bujol et al., v. Missouri Pacific Railroad Company, et al., No. 21,579, from putting into effect the decision of the Board of Appeals. The temporary restraining order was dissolved by the 19th Judicial District Court of the State of Louisiana, after hearing on a rule nisi, and the suit was dismissed at the costs of the plaintiffs. An appeal was perfected to the Supreme Court of Louisiana by the plaintiffs in that case and there the matter rests at the present time.

In the meantime, counsel for the plaintiffs in the Bujol case notified the Texas & Pacific Railway Company that his clients would sue for damages if the contract of June 2, 1927, effective June 20, 1927, were changed under the decision rendered by the Board of Appeals of the Brotherhood of Railroad Trainmen.

The foregoing chronological history of the facts lead to the present litigation. Prior to the institution of the complaint in the lower court, repeated efforts were made by the duly authorized agents of the Brotherhood of Railroad Trainmen to work out a change in the apportionment of work from 55 - 45 to one of 65 - 35, as between Missouri-Pacific and Texas & Pacific yardmen, but the threat of damage suits by the plaintiffs in the Bujol case allegedly prevented the two railroads from perfecting a change as ordered by the Board of Appeals of the Brotherhood of Railroad Trainmen.

STATEMENT OF THE CASE

Basing jurisdiction on diversity of citizenship and on the Railway Labor Act (45 U. S. C. A. §§ 151-164), the carriers filed suit in the District Court of the United States, Western District of Louisiana, against respondents and the individual petitioners herein, seeking a declaratory judgment under Section 274d of the Judicial Code (28 U. S. C. A. § 400) in accordance with the original and amended prayer of their complaint. (R. 10 and R. 124-126, inclusive). It was alleged that respondents were demanding the carriers to negotiate with them regarding a change in the apportionment of work stipulated in the agreement for yard operations in the joint yards at Alexandria, Louisiana, negotiated June 2, 1927, (R. 12-15), while the individual defendants were threatening to sue if a change were made.

Respondents filed a motion to dismiss the complaint for lack of jurisdiction of the subject matter, asserting that:

> "The matter in controversy herein is not one of a justiciable nature, and consequently, not subject to judicial review, it being a labor dispute under the Railway Labor Act, 45 U. S. C.A. sec. 151 et seq., and one over which Congress has foreclosed resort to the Courts for enforcement of the claims asserted by plaintiffs." (R. 53).

The decision of the District Court denying the motion to dismiss (R. 62-101) is reported in 60 F.

Supp. 263. The respondents then filed an original and amended answer (R. 102 and 121) admitting that there was a dispute between them and some of their members, as alleged, but denying that the dispute had any just basis in law or in fact. Pointing out that the Railway Labor Board compels the carriers to bargain with the accredited representatives of employees, and that the carriers admitting that the Brotherhood is such an accredited representative, respondents insisted that the existence of the dispute with some of their members supplied no justiciable controversy between them and the carriers, and hence no basis for a declaratory judgment.

A trial on the merits was had and the District Court held that the carriers were not required to amend and to interpret the contract of June 2, 1927, or to confer, negotiate or bargain with the Brotherhood of Railroad Trainmen in its desire to amend and to interpret said contract. The decision on the merits (R. 329-339), is reported in 63 F. Supp. 640. An appeal to the United States Circuit Court of Appeals, Fifth Circuit, was perfected. Six errors were specified, the first two dealing with the lack of jurisdiction over the subject matter and the erroneous action of the lower court in denying the motion to dismiss.

The Circuit Court of Appeals reversed the trial judge (R. 249-359). The opinion is reported in 159 F. 2d 822. (Advance Sheet No. 5, April 14, 1947). The Court held specifically that the complaint presented

no justiciable controversy and that it was a fundamental error on the part of the trial judge not to grant the motion to dismiss. Consequently, the judgment of the lower court was reversed and the cause remanded with directions to dismiss the suit.

ARGUMENT

It is our serious contention that the petitions for a writ of certiorari are without merit and should be denied. Careful study of the decision rendered by the United States Circuit Court of Appeals amply justifies this position. Not only did that Court hold that the complaint presented no justiciable controversy, but it further stated in part that:

> "*** *There is nothing here to adjudicate. The controversy which the carriers assert has been thrust upon them by the claims of the individual defendants is, as between the carriers and the Brotherhood non-existent. The carriers are under a statutory duty to negotiate with the Brotherhood.*" (Emphasis supplied).

Throughout, respondents have contended that Congress, by the enactment of the Railway Labor Act, has foreclosed resort to the courts for enforcement of the claims asserted by the carriers. The aim of the Railway Labor Act was to obtain simplicity and directness, both in the administrative procedure and on judicial review.

In order to get a clear and concise picture of the aim of the Act, it is necessary to review the pronounced

general purposes of the legislation, which are itemized in 45 U. S. C. A., § 151a. In view of the fact that the carriers alleged that this controversy arose under the Railway Labor Act, it necessarily follows that it must be settled under the provisions of that statute. When consideration is given to the stipulated purposes bearing Nos. 4 and 5 in § 151a, it is manifest that they are applicable to this dispute. If any command should appear in the Act whereby judicial remedy is afforded to enforce any one of the several purposes of the statute, an adherence of that remedy in the courts must prevail. In the absence of any such command, the disposition must be had through the medium of administrative machinery, which means negotiation, arbitration and mediation.

It was specifically held by this Honorable Court in General Committee of Adjustment of Brotherhood of Locomotive Engineers for Missouri-Kansas-Texas R. R. v. Missouri-Kansas-Texas R. Co. et al., 320 U. S., 323, 64 S. Ct. 146, that the command of the Railway Labor Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforceable in the courts should be implied. In short, the jurisdiction of a suit under the Railway Labor Act does not exist unless the plaintiff shows a legal right enforceable by the courts. That case supplied a test and furnished a yardstick of guidance for future determination of controversies arising under the statute involved. It was said:

"In view of the pattern of this legislation and its history the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation, mediation and arbitration. See H. Rep. No. 1944, 73d., Cong., 2nd. Sess., p. 2. Courts should not rush in where Congress has not been chosen to tread.

"We are concerned solely with the legal rights under this federal Act which are enforcible by courts. For unless such a right is found it is apparent that this is not a suit or proceeding 'arising under any law regulating commerce' over which the District Court had original jurisdiction by reason of § 24 (8) of the Judicial Code, 28 U.S.C., § 41 (8), 28 U.S.C.A. § 41 (8). Cf. People of Puerto Rico v. Russell & Co., 288 U. S. 476, 483, 53 S. Ct. 447, 449, 77 L. Ed., 903; Gully v. First Nat. Bank, 299 U. S. 109, 57 S. Ct. 96, 81 L. Ed., 70; Peyton v. Railway Express Agency, 316 U. S. 350, 352, 62 S. Ct. 1171, 1172, 86 L. Ed., 1525. When a court has jurisdiction it has of course 'authority to decide the case either way.' The Fair v. Kohler Die & Specialty Co., 228 U. S., 22, 25, 33, S. Ct., 410, 411, 57 L. Ed. 716. But in this

> case no declaratory decree should have been entered for the benefit of any of the parties. Any decision on the merits would involve the granting of judicial remedies which Congress chose not to confer."

There is no general provision for judicial review embodied in the Railway Labor Act. Congress expressly provided for judicial review in only two instances. In this connection, attention is directed to the decision rendered in Switchmen's Union of North America v. National Mediation Board, 320 U. S., 297, 64 S. Ct. 95, at page 99, to-wit:

> "Thus Congress gave the National Railroad Adjustment Board jurisdiction over disputes growing out of 'grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.' § 3, First (i), 45 U. S. C. A. § 153, subd. 1 (i). The various divisions of the Adjustment Board have authority to make awards. § 3, First (k)-(o). And suits based on those awards may be brought in the federal district courts. § 3, First (p). In such suits 'the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated.' The other instance in the Act where Congress provided for judicial review is under § 9, 45 U. S. C. A. § 159. The Act prescribes machinery for the voluntary arbitration of labor controversies. § 5, Third; § 7; § 8, 45 U. S. C. A. §§ 155, subd. 3, 157, 158. It is provided in § 9 that an award of a board of arbitration may be impeached by an action instituted

in a federal district court on the grounds specified in § 9, one of which is that 'the award plainly does not conform to the substantive requirements laid down by this Act for such awards, or that the proceedings were not substantially in conformity with this Act." § 9, Third (a). When Congress in § 3 and in § 9 provided for judicial review of two types of orders or awards and in § 2 of the same Act omitted any such provision as respects a third type, it drew a plain line of distinction. And the inference is strong from the history of the Act that that distinction was not inadvertent. The language of the Act read in light of that history supports the view that Congress gave administrative action under § 2, Ninth a finality which it denied administrative action under the other sections of the Act."

Likewise, it was shown that the emergence of railway labor problems from the field of conciliation and mediation into that of legally enforcible rights has been quite recent. Until 1926 the legal sanction to the various statutes had been few for the reason empasis of the legislation had been on conciliation and mediation. However, since 1926 there has been an increase in number of legally enforcible commands incorporated in the Railway Labor Act. Congress has utilized administrative machinery more freely in the settlement of disputes. It was further held:

"But large areas of the field still remain in the realm of conciliation, mediation, and arbitration. On only a few phases of this controversial subject

> has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. We need not recapitulate that history here. Nor need we reiterate what we have said in the Missouri-Kansas-Texas R. Co. case beyond our conclusion that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

This Honorable Court, in deciding the case from which the quotation above is a part, held that it was for Congress to determine how the rights which it creates shall be enforced. In passing on this point it was said that in such a case the specification of one remedy normally excludes another. It was further stated:

> "Generalizations as to when judicial review of administrative action may or may not be obtained are of course hazardous. When Congress has not expressly authorized judicial review, the type of problem involved and the history of the statute in question become highly relevant in determining whether judicial review may be nontheless supplied. See United States v. Griffin, 303 U. S. 226, 232-237, 58 S. Ct. 601, 604-606, 82 L. Ed. 764."

In Brotherhood of Railroad Trainmen et al. v. Toledo, P. & W. R. R., 321 U. S. 413, 64 S. Ct. 413, 418, it was said:

> "The Policy of the Railway Labor Act was to encourage use of nonjudicial processes of negotia-

tion, mediation and arbitration for the adjustment of labor disputes. Cf. General Committee of Adjustment of Brotherhood of Locomotive Engineers v. Missouri-Kansas-Texas R. Co., 320 U. S. 338, 64 S. Ct. 142."

We shall now pass on to further consideration of specific provisions of the Railway Labor Act. It is provided in Section 2 of the statute, paragraph first, 45 U. S. C. A., § 152 that it is the mandatory duty of all carriers to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise. Notwithstanding this provision, the two carriers sought a declaratory judgment in the lower court and the primary demand of their prayer was to the effect that they should not be required to negotiate or sign an agreement with the Brotherhood of Railroad Trainmen amending or interpreting the contract of June 2, 1927.

The history of the Railway Labor Act and its particular provisions have a special claim here. Judicial power is sought to be exerted in the enforcement of a right which plaintiffs claim that Congress created. It seems plain that Congress selected a very limited class of disputes to be solved by the courts, while it chose a different machinery for the settlement and adjustment of other controversies. The conclusion is inescapable that Congress carved out of the field of

conciliation, mediation and arbitration only the very select list of problems that it was willing to place in the adjudicatory channel. The remaining bulk was left to the voluntary processes long encouraged by Congress for the protection of interstate commerce from an industrial strife. As was said recently by the Supreme Court, in discussing this phase of the statute, "The concept of mediation is the antithesis of justiciability."

To show conclusively that no justiciable controversy is presented in this case, the decision rendered in General Committee v. Missouri-Kansas-Texas R. Co., supra, has peculiar applicability. There it was said:

> "But it is apparent on the face of the Act that while Congress dealt with this subject comprehensively, it left the solution of only some of those problems to the courts or to administrative agencies. It entrusted large segments of this field to the voluntary processes of conciliation, mediation, and arbitration. Thus by § 5, First, Congress provided that either party to a dispute might invoke the services of the Mediation Board in a 'dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference' and any other 'dispute not referable' to the Adjustment Board and 'not adjusted in conference between the parties or where conferences are refused.' Beyond the mediation machinery furnished by the Board lies arbitration. § 5, First and Third, § 7. In case both fail there is the Emergency Board which may be established

by the President under § 10. In short, Congress by this legislation has freely employed the traditional instruments of mediation, conciliation and arbitration. Those instruments, in addition to the available economic weapons, remain unchanged in large areas of this railway labor field. On only certain phases of this controversial subject has Congress utilized administrative or judicial machinery and invoked the compulsions of the law. Congress was dealing with a subject highly charged with emotion. Its approach has not only been slow; it has been piecemeal. Congress has been highly selective in its use of legal machinery. The delicacy of these problems has made it hesitant to go too fast or too far. The inference is strong that Congress intended to go no further in its use of the processes of adjudication and litigation than the express provisions of the Act indicate."

Petitioners seem to rely strongly upon the decision of Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 65 S. Ct. 226. A close study and analysis of that case will show that no comfort is offered therein to support the position, as there is no similarity of facts or of law applicable thereto. The late Chief Justice Stone was organ of the Court and he plainly stated in the first paragraph of the opinion that the question was whether the Railway Labor Act imposes on a labor organization, acting by authority of the statute as the exclusive bargaining representative of a craft or class of railway employees, the duty to represent all the employees in the craft without discrimination because

of their race, and, if so, whether the courts have jurisdiction to protect the minority of the craft or class from the violation of such obligation. With the question stated, what possible bearing could that case have directly upon the outcome of this litigation? Nothing is definitely the answer.

It is deemed advisable to point out the several glaring differences embodied in the present dispute. *First, no question of discrimination on account of racism is involved in this proceeding, whereby such existed in the cited case. Secondly, the question here is restricted by the Railway Labor Act to adjustment by recourse to the traditional implements of mediation, conciliation and arbitration or is determinable under the administrative scheme provided by the statute, while there was complete absence of procedure for settlement of the dispute under the Act in the adjudicated case. Thirdly, it was specially held in the Steele Case that the petitioner was without available administrative remedy, resort to which, when available, is prerequisite to equitable relief in the federal courts and that the Railway Labor Act condemned as unlawful the coduct of the carrier. Fourthly, the Brotherhood of Railroad Trainmen is not attempting to commit an illegal act. Finally, in the Steele Case, there were no differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board.*

The holding announced in Elgin, J. & E. Ry. Co., v. Burley, et al., 65 S. Ct. 1282, 325 U. S. 711, 66 S. Ct.

721, 327 U. S. 661, appears peculiarly applicable. In the first decision rendered in this case, which was later sustained on the rehearing, it was said:

> "To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract 'concerning rates of pay, rules, or working conditions.' It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. *For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.*" (Emphasis supplied).

It was very pointedly explained in the dissenting opinion of the case quoted from above that rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. Likewise, it was shown that to an increasing extent, courts require dissidents within a union to seek interpretation of the organization's rules and to seek redress for grievances arising out of them before appropriate union tribunals.

The Declaratory Judgment Act specifically provides that a declaratory judgment or decree may be granted whenever necessary or proper. It is submitted that

such a decree by the lower court in this case was not proper for the very simple reason the trial court was without jurisdiction. It is provided in Rule 57 of the Rules of Civil Procedure dealing with declaratory judgments that:

> "The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

Again it is submitted that a declaratory judgment should not have been entered in this proceeding, because such was not appropriate. The basis of this broad statement is traceable to the decision rendered in Bradley Lumber Co., v. National Labor Relations Board (CCA 5), 84 F, (2d) 97, cert. den., 299 U. S. 559, 57 S. Ct. 21, 81 L. Ed. 411, where it was held.

> "The power to render a declaratory judgment does not authorize a court to interfere with administrative proceedings at a point where it would not, under settled principles, have interfered with them under its power to enjoin."

Petitioners in the present proceeding did not venture to contend that the lower court should use its equity jurisdiction and enjoin the Brotherhood of Railroad Trainmen from making effective the decision of its Board of Appeals whereby the agreement of June 2, effective June 20, 1927, would be changed. The provisons of the Norris-LaGuardia Act, 29 U. S. C. A. § 108, would prevent the issuance of injunctive relief.

It was specifically held in Brotherhood of Railroad Trainmen et al. v. Toledo, P. & W. R. R., supra, that the overall policy of the Norris-LaGuardia Act was to encourage the use of the nonjudicial processes of negotiation, mediation and arbitration for the adjustment of labor disputes, as its prime purpose was to restrict the federal equity power in such matters within greatly narrower limits than it had come to occupy and to make injunction a last line of defense available not only after other legally required methods, but after all reasonable methods as well, had been tried and found wanting. It was also said in that case that under the Norris-LaGuardia Act, injunctive relief could be granted only when the complainant had complied with all legal obligations, and had made every reasonable effort to settle the dispute by negotiation and by available governmental machinery of mediation and by available governmental machinery of voluntary arbitration.

There can be no doubt but that the United States Circuit Court of Appeals correctly stated that the cases relied upon by respondents reflect the general rule. The broad scope and binding force of the general rule declared in the Switchmen's Union and General Committee cases in 320 U. S. cannot be ignored or explained away. The complaint of the carriers is silent and completely devoid of any allegation showing that they are justiciably concerned in the internal dispute between the members and the Brotherhood of Railroad Trainmen. The Court of Appeals very pointedly noted that fact. It must be remembered that the carriers are

under a statutory duty to negotiate with the Brotherhood, the accredited representative. Likewise, in default of negotiation, the carriers are subjected to rather severe penalties.

Since the Court of Appeals reached the conclusion that the complaint presented no justiciable controversy and that it was a fundamental error on the part of the trial court not to grant the motion to dismiss, it logically stated that:

> "We, therefore, do not reach the second question, whether the judgment was right on the merits."

CONCLUSION

When the pleadings and evidence are considered along with the controlling cases decided by this Honorable Court, cited and quoted from herein, it becomes crystal clear that no justiciable controversy between the carriers and respondents has been alleged or proven. Manifestly, the decision of the Court of Appeals is correct in every aspect. It is submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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In the

Supreme Court of the United States

THE TEXAS AND PACIFIC RAILWAY COMPANY, ET AL.,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, ET AL.,
Respondents.

REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT IN CAUSE NO. 11663, ENTITLED "BROTHERHOOD OF RAILROAD TRAINMEN, ET AL., APPELLANTS, VERSUS TEXAS & PACIFIC RAILWAY COMPANY, ET AL., APPELLEES".

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No. 136

In the

Supreme Court of the United States

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,
Petitioners,

v.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,
Respondents.

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To the Honorable, the Supreme Court of the United States:

Petitioners file this reply brief under the provisions of paragraph 4(a) of Rule 38.

Respondents' additional statement of facts merely re-emphasizes the need for a declaratory judgment in this case. It reflects the underlying controversy between the officers of the Brotherhood of Railroad Trainmen and the individual members of the Brotherhood concerning the authority of those officers to negotiate the proposed contract

with the railroad companies. The order of the Board of Appeals of the Brotherhood, quoted by Respondents (page 3), is the very order which the individual defendants contend, and the District Court found (R. 332, 335, 337, 338), was a nullity because the Board of Appeals was without jurisdiction. Consequently, the District Court found that the officers of the Brotherhood were acting "contrary to and in violation of the constitution and by-laws of said Brotherhood" (R. 340), and the District Court therefore decreed that the railroad companies, under such circumstances, are not required by law to confer, negotiate, bargain or treat with the officers of the Brotherhood concerning their desire to amend or interpret the contract of June 2, 1927 (R. 340).

Respondents admit (page 4) that the individual defendants threatened to sue the railroad companies for damages if they changed the contract of June 2, 1927, as desired by the officers of the Brotherhood purporting to act under the void order of its Board of Appeals. This was after institution of the Bujol suit (Exhibit D to Complaint, R. 24-44) which put the railroad companies on notice of the contention of the individual defendants, later sustained by the District Court (R. 332, 335, 337, 338, 340), that the officers of the Brotherhood were attempting to change the contract in violation of its constitution and by-laws. Respondents also admit their continued demands upon the railroad companies that the contract of June 2, 1927, be changed (page 3), notwithstanding the alleged violation of the constitution and by-laws of the Brotherhood, and Respondents admit their repeated assertion that the railroad

companies, on pain of "rather severe penalties" (page 20), are compelled by the Railway Labor Act to negotiate the desired changes (pages 6, 20) regardless of the claim of the individual defendants that the officers of the Brotherhood are proceeding in violation of its constitution and by-laws.

Placed in this position of "peril and insecurity" against which the Declaratory Judgment Act was intended to "afford relief", *Altvater v. Freeman, 319 U. S. 359, 365*, the railroad companies sought a judgment declaring the respective rights, obligations, and legal relations of the parties.

The railroad petitioners have nothing to gain either by changing or by not changing the contract of June 2, 1927, because, as stated by the District Court, "the aggregate wages to be paid will be the same" (R. 81). They are vitally interested, however, in procuring a judgment which will (1) declare the respective rights, obligations, and legal relations of the parties, (2) protect the railroad companies from penalty suits and from damage suits by the respective groups of defendants, and (3) answer the following questions presented by the record in this case:

1. Are officers of a labor union, a bargaining agent under the Railway Labor Act, required to comply with the union's constitution and by-laws as a condition precedent to their right under the Act to negotiate contracts with a railroad company?

2. Is a railroad company required by the Railway Labor Act to confer, negotiate, bargain or treat with, and if pos-

sible to reach an agreement with, officers of a labor union, a bargaining agent under the Act, after being notified by employees who would be injuriously affected that the officers of the union are proceeding in violation of its constitution and by-laws and that such employees will sue the railroad company for damages should such agreement be made?

3. Does the Railway Labor Act require a railroad company to confer, negotiate, bargain or treat with, and if possible to reach an agreement with, officers of a labor union, a bargaining agent under the Act, after a District Court of the United States has found that such officers are proceeding in violation of the union's constitution and by-laws and that employees who would be injuriously affected have been denied a right under the union's constitution?

4. If the answer to question 2 or 3 is "Yes", does the railroad company become liable in damages to its employees who are injured by such conferring, negotiating, bargaining, treating, and the agreement resulting therefrom?

5. If the answer to question 2 or 3 is "No", is the railroad company subject to any penalty under the Railway Labor Act, and is it liable in damages to the labor union or to any person represented by it, or to any employee who might be injured by the failure or refusal of the railroad company to confer, negotiate, bargain or treat with, and if possible to reach an agreement with, the officers of the labor union?

Manifestly, these are important questions "affecting the application and operation" of the Railway Labor Act, which should be resolved by this Court, *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711, 713,* and they are questions "of importance in the orderly administration of the Railway Labor Act", *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147,* decided by this Court on January 13, 1947; *Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210; Steele v. Louisville & N. R. Co., et al., 323 U. S. 192, 194.*

The Circuit Court would have answered these questions had it written into a judgment what it thus declared:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them can therefore make the carriers liable" (R. 359).

But the Circuit Court refused to state these legal conclusions in a declaratory judgment because it erroneously concluded (R. 355, 356) that it was compelled to dismiss the complaint upon what it conceived to be the "controlling authorities" (R. 358) cited by Respondents, to-wit: *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323; Switchmen's Union v. National Mediation, 320 U. S. 297; Brotherhood of Railroad Trainmen v. Toledo, 321 U. S. 50;* and the decision of the Circuit Court in *Bradley Lumber Co. v. N. L. R. B., 84 Fed. (2d) 97* (R. 353-354).

As we have heretofore shown, those cases do not support the dismissal order (Brief in support of petition, pages 30-31).

In *Brotherhood of Railroad Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50*, this Court held that the federal courts could not enjoin strike violence on the Toledo, Peoria & Western Railroad because that company had refused to arbitrate disputes relating to rates of pay and working conditions, as provided in the Railway Labor Act. In *Bradley Lumber Co. v. National Labor Relations Board, 84 Fed. (2d) 97*, the Circuit Court held that a federal court could not enjoin the taking of testimony by a Regional Director for the National Labor Relations Board, and that the Declaratory Judgment Act conferred no greater power "to stop or interfere with administrative proceedings" or extend equity jurisdiction to "controversies which have not yet reached the judicial stage." No such issues are involved in the instant case. Here, the questions at issue are the authority of the bargaining agent and the liability, if any, of the railroad companies resulting from their agreements with that agent. Furthermore, this case is in furtherance of, instead of an interference with, administrative proceedings because the Court in this case can chart a course which will remove confusion, doubt, uncertainty and delay in the orderly administration of the Railway Labor Act.

This is not the first time that litigants have urged, as in this case, a warped interpretation and an abortive application of the decisions of this Court in *Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323*, and *Switchmen's Union v. National Mediation, 320 U. S. 297*, in an effort to avoid access to and a decision by the courts of the land. It was attempted, but rejected by this Court, in *Steele v. Louisville & N. R. Co., 323 U. S. 192, 204-205;*

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 213; and *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147.* In those cases this Court made it plain that the *M.-K.-T.* and *Switchmen's Union* decisions must be limited to cases involving "a jurisdictional dispute, determinable under the administrative scheme set up by the (Railway Labor) Act * * * or restricted by the Act to voluntary settlement by recourse to the traditional implements of mediation, conciliation and arbitritation", to questions of "who is entitled to represent the craft, or who are members of it, issues which have been relegated for settlement to the Mediation Board", to "differences as to the interpretation of the contract which by the Act are committed to the jurisdiction of the Railroad Adjustment Board", *Steele v. Louisville & N. R. Co., 323 U. S. 192, 204-205; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210, 213;* and to "an administrative determination which Congress has made final and beyond the realm of judicial scrutiny", *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146, 4147.* The reasons for this, and the utter inapplicability of the *M.-K.-T.* and *Switchmen's Union* decisions to the case at bar, are perfectly apparent from this Court's statements of the issues involved in those cases, to-wit:

Brotherhood of Locomotive Engineers v. M.-K.-T. R. Co., 320 U. S. 323:

> "This case involves a dispute under the Railway Labor Act concerning the authority of two railroad

Brotherhoods to represent certain employees in collective bargaining with the defendant-carriers. The petitioner (hereinafter called the Engineers) is a committee of the Brotherhood of Locomotive Engineers which has been and is the duly designated bargaining representative for the craft of engineers employed by the carriers. The third-party defendant (hereinafter called the Firemen) is a committee of the Brotherhood of Locomotive Firemen and Enginemen which has been and is the duly designated bargaining representative for the craft of firemen on the same lines. Each craft has long had an agreement with the carriers concerning rules, rates of pay, and working conditions. The agreement with the Engineers states that the right to make and interpret contracts, rules, rates and working agreements for locomotive engineers is vested in that committee. The agreement with the Firemen contains a similar provision concerning members of that craft. Both agreements also contain rules governing the demotion of engineers to be firemen, the promotion of firemen to be engineers, and return of demoted enginers to their former work. For many years the two Brotherhoods had an agreement which established rules and regulations on these subjects and which provided machinery for resolving disputes which might arise between them. This agreement was cancelled in 1927. The present dispute arose since that time and relates to the calling of engineers for emergency service. In general the Engineers and the carriers had a working arrangement providing (1) that, excepting Smithville, Texas, the senior available demoted engineer whose home terminal was at the place where the service was required or the man assigned to the particular run as fireman, if he had greater seniority as engineer, would be chosen when it was necessary to call an engineer for emergency service; (2) that the regulation of the engineers' working lists was to be handled by the Engineers' local chairman, not by the management; and (3) that at Smithville, emergency work would be performed by advancing the assign-

ment of engineers in the so-called 'pool', instead of calling in emergency engineers. These arrangements were not satisfactory to the Firemen. After protest to the carriers and after a failure of the Brotherhoods to resolve their dispute the matter was submitted to the National Mediation Board for mediation. The Engineers did not participate. The Firemen and the carriers entered into the Mediation Agreement of December 12, 1940, the validity of which is here challenged. The effect of that agreement was in general to eliminate the preference previously given to engineers of the home terminal and the special arrangement at Smithville in favor of the pool engineers. It also changed the practice respecting the handling of the engineers' working lists —thereafter the assignments would be handled by the management assisted by the local chairmen of the two groups. After making the agreement the carriers gave notice to the Engineers that they were cancelling previous arrangements with that Brotherhood.

"The Engineers then brought this action for a declaratory judgment (48 Stat. 955, 28 U. S. C. sec. 400) that the agreement of December 12, 1940, was in violation of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185, 45 U. S. C. sec. 151) and that the Engineers should be declared to be the sole representative of the locomotive engineers with the exclusive right to bargain for them" (pages 325-327).

"It is true that the present controversy grows out of an application of the principles of collective bargaining and majority rule. It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority" (pages 334-335).

"*It seems to us plain that when Congress came to the question of these jurisdictional disputes, it chose not to leave their solution to the courts*" (our italics) (page 336).

Switchmen's Union v. National Mediation, 320 U. S. 297:

"This is an action by the petitioners, the Switchmen's Union of North America and some of its members against the National Mediation Board its members, the Brotherhood of Railroad Trainmen, and the New York Central Railroad Company and the Michigan Central Railroad Company. The individual plaintiffs are members and officials of the Switchmen's Union and employees of the respondent carriers.

"Petitioners were plaintiffs in the District Court. A certification of representatives for collective bargaining under Sec. 2, Ninth of the Railway Labor Act (44 Stat. 577, 48 Stat. 1185) was made by the Board to the carriers. This certification followed the invocation of the services of the Board to investigate a dispute among the yardmen as to their representative. The Brotherhood sought to be the representative for all the yardmen of the rail lines operated by the New York Central system. The Switchmen contended that yardmen of certain designated parts of the system should be permitted to vote for separate representatives instead of being compelled to take part in a system-wide election.

"The Board designated all yardmen of the carriers as participants in the election. The election was held and the Brotherhood was chosen as the representative. Upon the certification of the result to the carriers, petitioners sought to have the determination by the Board of the participants and the certification of the representatives cancelled. This suit for cancellation was brought in the District Court" (pages 298-299).

"The Act in Sec. 2, Fourth writes into law the 'right' of the 'majority of any craft or class of employees' to 'determine who shall be the representative of the craft or class for the purpose of this Act'. That 'right' is protected by Sec. 2, Ninth which gives the Mediation Board the power to resolve controversies concerning it and as an incident thereto to determine what is the

appropriate craft or class in which the election should be held" (pages 300-301).

"We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate" (our italics) (page 300).

It is clear from the above quotations that the *M.-K.-T.* and *Switchmen's Union* decisions cannot possibly control the disposition of this case in which the questions at issue are the authority of the bargaining agent and the liability, if any, of the railroad companies resulting from their agreements with that agent. On the contrary, as this Court said in *The Order of Railway Conductors of America, et al. v. O. E. Swan, et al., 15 Law Week 4146*, "at the outstart it is important to note that judicial review of this matter is not precluded by the principles set forth" in the *M.-K.-T.* and *Switchmen's Union* cases; "we are dealing here with something quite different from an administrative determination which Congress has made final and beyond the realm of judicial scrutiny"; "the issue is primarily one of statutory interpretation"; "the problem thus is to determine what Congress meant" (page 4147). Only the Courts can make this determination, *Bank of Hamilton v. Dudley, 2 Peters 317, 336, 27 U. S. 492, 524; Elmendorf v. Taylor, 10 Wheaton 67, 70, 23 U. S. 152, 159; United States v. American Trucking Ass'ns, 310 U. S. 534, 544.* The Railway Labor Act does not authorize the National Railroad Adjustment Board, or the National Mediation Board, or any other administrative agency, to pass upon these questions, or to bind the parties if they did (Brief in support of petition, pages 31-32).

The authority of the bargaining agent was at issue in *Steele v. Louisville & N. R. Co., et al., 323 U. S. 192; Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U. S. 210;* and *Elgin, J. & E. R. Co. v. Burley, 325 U. S. 711,* in each of which cases this Court granted certiorari.

In the *Steele case,* the Supreme Court of Alabama held that a railroad company was required to make the agreement there under attack because the Railway Labor Act "places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft" and "imposes heavy criminal penalties for willful failure to comply with its command" (323 U. S. 197). Disagreeing, this Court recognized that the Act creates "the relationship of principal and agent between the members of the craft and the Brotherhood" (323 U. S. 198), and invalidated the agreement because the Brotherhood, in violation of its statutory duty, had contracted against a minority whom it was required to represent (323 U. S. 198-203). The *Tunstall case* is to the same effect (323 U. S. 211-212).

In the *Burley case,* certain employees of the Elgin, J. & E. Ry. Co., among other things, challenged the authority of a union representative under the Railway Labor Act, and its officers, to release their individual claims or to submit them to the National Railroad Adjustment Board (325 U. S. 718). As stated by this Court:

> "They relied upon provisions of the Brotherhood's constitution and rules, of which the carrier was alleged to have knowledge, as forbidding union officials to

> release individual claims or to submit them to the Board 'without specific authority to do so granted by the individual members themselves'; and denied that such authority in either respect had been given" (325 U. S. 718).

Holding that "the collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose" (325 U. S. 728), this Court remanded the cause for a determination of the "crucial issue" of whether the employees "had authorized the Brotherhood in any legally sufficient manner to represent them" (325 U. S. 748). On rehearing, this Court adhered to its former decision and reëmphasized the right of the complaining employees to challenge the lack of authority of the bargaining agent in the courts—"the forum where such issues properly are triable" (327 U. S. 667).

It is clear from the foregoing authorities that a justiciable and an actual controversy exists between the railroad companies and the Brotherhood of Railroad Trainmen and its Rapides Lodge No. 856; that a justiciable and an actual controversy exists between the railroad companies and the individual defendants; and that the railroad companies are entitled to a declaratory judgment removing them from their present position of "peril and insecurity", as contemplated by the Declaratory Judgment Act, *Altvater v. Freeman, 319 U. S. 359, 365.*

Furthermore, it is now a matter of common knowledge that this case, like the *Steele, Tunstall* and *Burley* cases, is only one of many instances in which employees on nu-

merous railroads are challenging the right of officers of labor unions, accredited representatives under the Railway Labor Act, to make, amend or terminate contracts with railroad companies on the ground that such officers are acting in violation of the unions' constitutions and by-laws In many instances, such as this, those employees are threatening damage suits against the railroad companies if they make, amend or terminate such contracts as requested by the officers of the unions. On the other hand, the union officers are insisting, as in this case, that the railroad companies are required by the Railway Labor Act to confer, negotiate, bargain or treat with them, and if possible reach an agreement, notwithstanding such charges by the individual members of the unions, or suffer penalties for their willful failure so to do. This creates confusion, doubt, uncertainty and delay in the orderly administration of the Railway Labor Act and places the railroad companies in positions of peril and insecurity. A writ of certiorari should be granted in this case so that this Court may declare the respective rights, obligations, and legal relations of the parties in respect to these matters and forever set such questions at rest.

WHEREFORE, petitioners pray, as in their petition and original brief, that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court a full and complete transcript of the record and proceedings of said Circuit Court in the case on its docket numbered 11663, entitled "Brotherhood of Railroad Trainmen, et al., Appellants,

versus Texas & Pacific Railway Company, et al., Appellees", to the end that said cause may be reviewed and determined by this Court as provided by the Statutes of the United States; that the judgment of said Circuit Court be reversed; and for such other and further relief as this Court may deem proper.

Dated July 16, 1947.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 136

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,

Petitioners,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 136

THE TEXAS AND PACIFIC RAILWAY COMPANY, *et al.*,

Petitioners,

vs.

BROTHERHOOD OF RAILROAD TRAINMEN, *et al.*,

Respondents.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Supreme Court of the United States:

Petitioners earnestly request the Court to review and grant their petition for a writ of certiorari because:

I.

The Court Should Clarify the Uncertain State of the Law Produced by Its Former Decisions.

This is a suit for a declaratory judgment. A union bargaining agent under the Railway Labor Act demanded that petitioners negotiate changes in a working agreement, or suffer a penalty for their failure so to do. Employees who would be injuriously affected threatened petitioners with damage suits if such changes were made, alleging that the officers of the union were proceeding in violation of its constitution and by-laws. This violation was found

to be a fact by the District Court, which entered a declaratory judgment [R. 340]. The Circuit Court ordered a dismissal of the cause for lack of a justiciable controversy [R. 356; 159 F. 2d 826].

Mr. Justice Frankfurter, joined by Chief Justice Stone, Mr. Justice Roberts and Mr. Justice Jackson, thus stated one of the principles of law at issue in this case:

> "The carrier is under a legal duty to treat with the union's representative for the purposes of the Railway Labor Act. Section 2, Ninth; see *Virginian R. Co.* v. *System Federation*, 300 U. S. 515. We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty," *Elgin, J. & E. R. Co.* v. *Burley*, 325 U. S. 755.

The same principle was announced by the Circuit Court in this case when it declared:

> "The carriers are under a statutory duty to negotiate with the Brotherhood",

and that Court then stated the second principle at issue in this case when it added:

> "Neither negotiation nor an agreement with them therefore can make the carriers liable" [R. 359; 159 F. 2d 827].

These pronouncements, however sound, unfortunately furnish no guide to litigants because (1) the declarations of Mr. Justice Frankfurter, and his colleagues, appear in a dissenting opinion, and (2) the statements of the law by the Circuit Court are *obiter dicta*, coming after a decision that the cause should be dismissed [R. 356; 159 F. 2d 826].

The third principle at issue is the justiciability of the controversy.

Petitioners instituted this action for declaratory judgment against the bargaining agent and against the employees who claimed they would be injured because:

1. Courts will protect a union member's seniority rights, arising out of the union's collective bargaining contract and its constituiton, "against action by the union which is arbitrary, fraudulent, illegal, or in excess of the union's powers or those of the officers or tribunals through which it acts," and Courts will protect a union member's seniority rights, secured by rules and contract of the Brotherhood, "against prejudicial change by a tribunal of the brotherhood acting in excess of powers conferred upon it by the brotherhood's constitution," *142 A. L. R. 1067,* Limitations on General Rule;

2. Petitioners had learned of the unhappy experience of the Louisville & Nashville Railroad Company in the *Steele case,* notwithstanding the declaration of the Supreme Court of Alabama that the Railway Labor Act "places a mandatory duty on the Railroad to treat with the Brotherhood as the exclusive representative of the employees in a craft" and "imposes heavy criminal penalties for willful failure to comply with its command," *Steele* v. *Louisville & N. R. Co., et al.,* 323 U. S. 197; and

3. The decisions of this Court do not clearly define, but leave uncertain, the respective obligations, duties, rights and other legal relations of petitioners, their employees and the bargaining agent, under circumstances where, as here, employees who would be adversely affected have put petitioners on notice that the officers of the union are proceeding in violation of its constitution and by-laws.

Petitioners respectfully submit that the latter statement is warranted by the following quotations from decisions of this Court:

Virginian Ry. v. *Federation,* 300 U. S. 515:

"It [the Railway Labor Act] at least requires the employer to meet and confer with the authorized rep-

resentative of its employees, to listen to their complaints, to make reasonable effort to compose differences—in short, to enter into a negotiation for the settlement of labor disputes such as is contemplated by § 2, First" (page 548).

Steele v. *L. & N. R. Co.*, 323 U. S. 192.

In reversing the Supreme Court of Alabama, this Court said:

"It construed the statute, not as creating the relationship of principal and agent between the employees of the craft and the Brotherhood", etc. (page 198).

Elgin, J. & E. R. Co. v. *Burley*, 325 U. S. 711.

"They (respondent employees) relied upon provisions of the Brotherhood's constitution and rules, of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board 'without specific authority so to do granted by the individual members themselves'; and denied that such authority in either respect had been given" (page 718).

"The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose" (page 728).

In light of these decisions, we respectfully suggest that each member of the Court ask himself whether or not he could safely advise a railroad client to negotiate or not to negotiate an agreement with a union bargaining agent when employees, who would be adversely affected thereby, have put the railroad on notice that the officers of the union are proceeding in violation of its constitution and bylaws and that such employees will sue the railroad in damages if such agreement is made.

In this case the Court can, and petitioners pray that it will, declare the law in plain and unequivocal language so that petitioners, their employees, and the bargaining agent, who must live under the Railway Labor Act, may at least know what it means.

II.

The Controversy Is Actual and Justiciable Within the Meaning of the Declaratory Judgment Act.

The controversy is actual and justiciable whether tested by the decisions of this Court or by the legislative history of the Declaratory Judgment Act which petitioners have sought, so far without success, to have applied in this case.

The determining factors have been thus stated by this Court:

Maryland Casualty Co. v. *Pacific Co.*, 312 U. S. 270.

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment" (page 273).

Aetna Life Ins. Co. v. *Haworth*, 300 U. S. 227.

> "The Declaratory Judgment Act of 1934, in its limitation to 'cases of actual controversy,' manifestly has regard to the constitutional provision and is operative only in respect to controversies which are such in the constitutional sense. The word 'actual' is one of emphasis rather than of definition. * * *" (pages 239-240).
>
> * * * * *
>
> "A 'controversy' in this sense must be one that is appropriate for judicial determination. *Osborn* v. *United States Bank*, 9 Wheat. 738, 819. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot. *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116. The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. *South Spring*

> *Gold Co.* v. *Amador Gold Co.*, 145 U. S. 300, 301; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Massachusetts* v. *Mellon*, 262 U. S. 447, 487, 488. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. * * * Where there is such a concrete case admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised * * *" (pages 240-241).

The instant case meets every test set forth in the quoted decisions. Furthermore, if this Court should write into a *judgment* the *obiter dicta* of the Circuit Court, viz.:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them therefore can make the carriers liable [R. 359; 159 F. 2d 827],

that judgment will terminate this litigation.

This controversy also will be found actual and justiciable when tested by the legislative history of the Declaratory Judgment Act. That history is set forth in House Report No. 1264 and in Senate Report No. 1005, 73d Congress, 2nd Session, and in extracts from "Declaratory Judgments", by Edwin Borchard, Co-draftsman of that Act*. Copies of those documents, marked Exhibits A, B, and C, respectively, are attached hereto. The following quotations are indicative of the contents of those exhibits:

HOUSE REPORT No. 1264.

> "The 'declaratory judgment' is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost *any determinative fact or law.* * * * It is intended to

* Congressional Record, page 2027, 70th Congress, 1st Session.

save tedious and costly litigation by ascertaining at the outset the controlling fact or law involved, thus either concluding the litigation or thereafter confining it within more precise limitations" (Exhibit A, page 3).

"The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

"A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

> 'The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights, and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before any injury has been done'" (Exhibit A, pages 2-3).

SENATE REPORT No. 1005.

"An important practical advantage of the declaratory judgment lies in the fact that it enables litigants to narrow the issue, speed the decision, and settle the controversy before an accumulation of differences and hostility has engendered a wide and general conflict, involving numerous collateral issues" (Exhibit B, page 5).

"The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages" (Exhibit B, page 4).

"There seems little question that in many situations in the conduct of business serious disputes occur between parties, where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and so-

cial peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties" (Exhibit B, pages 4-5).

"Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace* v. *Thompson* (263 U. S. 197, 216, 44 Sup. Ct. 15, 1923), by Butler, J., when it said:

> 'They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights'" (Exhibit B, page 9).

"Declaratory Judgments."

(Edwin Borchard.)

"In these typical cases, no wrong or even hostile activity has been committed or threatened—a condition, it may be observed, which justified judicial relief in various equitable actions long before declaratory actions and judgments were eo nomine specifically authorized. What is visible in this type of case is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, impairs or jeopardizes his pecuniary or other interests. Jurisdictions authorizing the procedure for a declaratory judgment recognize that these interests are sufficiently important to warrant legal and judicial protection; those not authorizing the procedure have apparently not yet become aware either of the interest in question or of the social need of protecting them. A survey of some of the cases that have been decided under this procedure discloses it as an essential means of bringing to judicial cognizance many important legal issues

and of settling legal controversies promptly and efficiently before violence or hostile action has caused irreparable injury" (Exhibit C, page 2).

"Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the status quo. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial. The controversy was ripe for decision before the violence and destruction had begun. Once this fact becomes clear, the value of the declaratory judgment will be even more generally recognized. For, as Congressman Gilbert remarked in the debate on the first federal declaratory judgments bill,

> 'Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step' " (Exhibit C, page 6)*.

III.

The Procedure Suggested by the Circuit Court Would Defeat the Purposes of the Declaratory Judgment Act.

After declaring that this cause should be dismissed, the Circuit Court recommended that the railroads negotiate an agreement with the bargaining agent, stating that if

> "any of the members have a just ground of complaint that the collective agreement is not binding on them for want of authority of the bargaining agent",

they can "obtain relief from it" the same "as Steele and Tunstall did"** [R. 359; 159 F. 2d 827].

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* Also quoted with approval in Senate Report No. 1005, Exhibit B, page 5.

** *Steele* v. *L. & N. R. Co.*, 323 U. S. 192.
Tunstall v. *Brotherhood*, 323 U. S. 210.

In support of these conclusions, the Circuit Court quoted the following paragraph from the opinion of this Court in the *Steele case*:

> " 'The representative which thus discriminates may be enjoined from so doing, and its members may be enjoined from taking the benefit of such discriminatory action. No more is the Railroad bound by or entitled to take the benefit of a contract which the bargaining representative is prohibited by the statute from making" [R. 359; 159 F. 2d 827-828].

Instead of entering the declaratory judgment sought by petitioners, which would have terminated this litigation, the Circuit Court would have the railroads and the bargaining agent make an agreement and then find out, in an injunction and damage suit, whether or not the agreement should have been made. This recommended procedure is precisely what the Declaratory Judgment Act was designed to prevent. It was what Representative Gilbert had in mind when he declared:

> "Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take the step" (Senate Report No. 1005, Exhibit B, page 5; "Declaratory Judgments" by Edwin Borchard, Exhibit C, page 6).

Petitioners pray that this Court will "turn on the light" by entering a declaratory judgment so that neither they, nor their employees, nor the bargaining agent will step "in a hole" in the dark.

The Circuit Court said, in effect, that *if* the collective agreement which results from the negotiations is not binding on the employee defendants "for want of authority of the bargaining agent", then "it will not be binding on them or on the carriers"; but *if* the bargaining agent has the necessary authority, "the agreement will be binding"

on the employee defendants [R. 359; 159 F. 2d 827-828]. The Circuit Court did not seem to realize that there would be no *"ifs"* and that this litigation would be terminated by a judgment, instead of *obiter dicta,* in which it were declared that:

> "The carriers are under a statutory duty to negotiate with the Brotherhood. Neither negotiation nor an agreement with them therefore can make the carriers liable" [R. 359; 159 F. 2d 827].

After all of this, the Circuit Court concluded by way of *obiter dicta* that:

> "In either event, plaintiffs-carriers will be protected. In neither event will they have anything to fear" [R. 360; 159 F. 2d 828].

Petitioners wish they were as certain about this as the Circuit Court. But they have read the *Steele* and *Tunstall cases,* wherein damage suits against the Louisville & Nashville Railroad Company and the Norfolk & Southern Railway Company have been approved, and those decisions have not allayed their fears.

We fully agree with the apparent reasoning of the Circuit Court that the railroads, if required by law to deal with the bargaining agent, ought not to be answerable in damages to employees injured by such dealing even though the officers of the union are proceeding in violation of its constitution and by-laws. But the way to make certain of this is not through *obiter dicta* but by declaring the principle in a judgment, binding on everyone, wherein it is made plain that the employees' cause of action, if any, is solely against the bargaining agent and its officers who violate the union's constitution and by-laws.

IV.

The Interpretation Placed Upon the Declaratory Judgment Act by the Circuit Court of Appeals for the Fifth Circuit in This Case Is Contrary to and in Conflict With the Interpretations Placed Upon the Act by the Emergency Court of Appeals and by the Circuit Courts of Appeal for the Third, Fourth, Sixth and Seventh Circuits.

The refusal of the Circut Court of Appeals for the Fifth Circuit to enter a declaratory judgment in this case, and its direction that petitioners and the bargaining agent endeavor to negotiate an agreement, subject to a subsequent injunction and damage suit by twenty-nine employee defendants, is in conflict with the interpretations placed upon the Declaratory Judgment Act by the Emergency Court of Appeals and by the Circuit Courts of Appeal for the Third, Fourth, Sixth and Seventh Circuits, viz:

EMERGENCY COURT.

> "Under that [Declaratory Judgment] Act, if there is a reasonable dispute between the parties as to application and interpretation of an act of Congress or administrative order, either party has a right to resort to the District Court in an application for declaratory judgment," *Gordon* v. *Bowles,* 153 F. 2d 614, 616.

THIRD CIRCUIT.

> "In providing the remedy of a declaratory judgment it was the Congressional intent 'to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued.' *E. Edelman & Co.* v. *Triple-A Specialty Co.,* 7 Cir., 1937, 88 F. 2d 852, 854. This Court has emphasized that the Act should have a lib-

eral interpretation, bearing in mind its remedial character and the legislative purpose. *Alfred Hofmann, Inc.* v. *Knitting Machines Corp.*, 3 Cir., 1941, 123 F. 2d 458, 460; *Treemond Co.* v. *Schering Corp., supra,* 122 F. 2d at page 703," *Dewey & Alma Chemical Co.* v. *American Anode,* 137 F. 2d 68, 69-70; certiorari denied, 320 U. S. 761.

FOURTH CIRCUIT.

"The statute providing for declaratory judgments meets a real need and should be liberally construed to accomplish the purpose intended, *i.e.*, to afford a speedy and inexpensive method of adjudicating legal disputes without invoking the coercive remedies of the old procedure, and to settle legal rights and remove uncertainty and insecurity from legal relationships without awaiting a violation of the rights or a disturbance of the relationships," *Aetna Casualty & Surety Co.* v. *Quarles,* 92 F. 2d 321, 325.

SIXTH CIRCUIT.

"The conclusion of the District Court that the bill must be dismissed because the Declaratory Judgment Act comprehends situations only where the plaintiff seeks to establish a right and not those wherein he seeks to escape liability, is founded upon a misconception both of its terms and purpose. Even were it possible to conceive that immunity from threatened liability is not a right, the statute, by its terms, empowers the court to declare not only rights, but 'other legal relations' of any interested party petitioning for the declaration, and as was also noted in the Cold Metal Process case, *supra,* its purpose is to provide a remedy to the challenger of a right, who otherwise could not have his challenge adjudicated until his adversary took the initiative," *Employers' Liability Assur. Corporation* v. *Ryan,* 109 F. 2d 690, 691.

"Diversity of citizenship existing between the appellant and its insured, and the jurisdictional amount being involved in the controversy, the appellant had a

right under the Act to seek declaratory relief. This right could not in any way be affected by what thereafter transpired in the state court. Moreover, the question of the appeliant's liability under its agreement, could fully and completely be decided upon the issue presented by its bill, avoiding a multiplicity of suits, or defenses," *Maryland Casualty Co.* v. *Faulkner*, 126 F. 2d 175, 178.

SEVENTH CIRCUIT.

"The Declaratory Judgment Act merely introduced additional remedies. It modified the law only as to procedure and, though the right to such relief has been in some cases inherent, the statute extended greatly the situations under which such relief may be claimed. It was the congressional intent to avoid accrual of avoidable damages to one not certain of his rights and to afford him an early adjudication without waiting until his adversary should see fit to begin suit, after damage had accrued," *E. Edelman & Co.* v. *Triple-A Specialty Co.*, 88 F. 2d 852, 854; certiorari denied, 300 U. S. 680.

See also *Davis* v. *American Foundry Equipment Co.*, 94 F. 2d 441, 442, and *Milwaukee Gas Specialty Co.* v. *Mercoid Corp.*, 104 F. 2d 589, 591-592.

Prayer.

Wherefore, petitioners pray that the Court will review and grant their petition for a writ of certiorari; that upon hearing of this cause the Court will enter a judgment declaring the obligations, duties, rights and other legal relations of the parties; that should the Court be of the opinion, as was the Circuit Court, that petitioners are required by law to negotiate with the bargaining agent even though its officers are proceeding in violation of its constitution and by-laws, that the Court in its judgment declare that

petitioners will not be answerable in damages to their employees injured by such negotiation, or by the agreement resulting therefrom, and that said employees' cause of action, if any, is solely against the bargaining agent and its officers who violate the union's constitution and by-laws; and for all other and further relief to which petitioners may be entitled.

Dated November 6, 1947.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I, M. E. CLINTON, of counsel for petitioners, hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and that I, on this date, have mailed a copy of this petition to Mr. Kemble K. Kennedy and to Mr. Fred G. Benton, counsel for all of the other parties to this cause.

Dated November 6, 1947.

M. E. CLINTON,
Of Counsel.

Exhibits.

Exhibits.

EXHIBIT A.

73d CONGRESS
2nd Session

HOUSE OF REPRESENTATIVES
REPORT No. 1264

AMEND THE JUDICIAL CODE

April 17, 1934.—Referred to the House Calendar and ordered to be printed

MR. MONTAGUE, from the Committee on the Judiciary, submitted the following

REPORT

(To accompany H. R. 4337)

The Committee on the Judiciary, to which was referred H. R. 4337, having considered the same, orders it to be favorably reported with the recommendation that the bill do pass.

The bill is as follows:

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That the Judicial Code, approved March 3, 1911, is hereby amended by adding after section 274C thereof a new section to be numbered 274D, as follows:

"Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed,

and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

"(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

"(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury such issues may be submitted to a jury in the form of interrogatories, with proper instruction by the court, whether a general verdict be required or not."

The bill fairly discloses its purpose and scope. It extends the judicial power for the rendition of what is known as "declaratory judgments," a procedure which has been substantially adopted in some form by 27 of the American States, by Great Britain for nearly 40 years, by Scotland for nearly 400 years, by several European nations, and by India, Australia and Canada, and wherever adopted it has given pronounced satisfaction in that it has accomplished most wholesome simplification and expedition in the administration of justice. Indeed, the delay in the exercise of this power and procedure by all of the States and by the Federal Government is difficult to appreciate.

The principle involved in this form of procedure is to confer upon the courts the power to exercise in some instances preventive relief; a function now performed rather clumsily by our equitable proceedings and inadequately by the law courts.

A most simple and striking definition of the procedure is thus made by Professor Borchard, of the Yale University School of Law. He writes:

The declaratory judgment, it will be recalled, enables parties who are uncertain of their legal rights,

and are pecuniarily or otherwise prejudiced by actual or potential adverse claims by others, to invoke the aid of the courts for the determination of their rights before any injury has been done.

Therefore, this form of preventive relief is distinguishable from curative relief in that the latter is incapable of redress until an injury has occurred or the contract broken.

The bill under consideration does not exhaust the principles involved in support of "declaratory judgments," but is a modified effort to secure relief by such procedure. The first section confines relief to actual, not potential, controversies; and the procedure may be invoked whether or not further consequential relief should be had, though a declaratory judgment has the force and effect of a final judgment or decree. Again, large discretion is conferred upon the courts as to whether or not they will administer justice by this procedure.

The "declaratory judgment" is a useful procedure in determining jural rights, obligations, and privileges, but may be applied to the ascertainment of almost any determinative fact or law. The declaration of a status was perhaps the earliest exercise of this procedure, such as the legality of marriage, the construction of written instruments, and the validity of statutes. It is intended to save tedious and costly litigation by ascertaining at the outset the controlling fact or law involved, thus either concluding the litigation or thereafter confining it within more precise limitations. If the meaning of a contract is controverted, for example, it may be needless to break it in order to obtain authoritative construction of the instrument, thus saving time and cost. These and other instances, together with the successful experience of the States which have used the procedure, make it most desirable that this legislation should be enacted.

In accordance with the rule there is printed below a copy of the law, showing in italics the new language.

Sec. 274A. In case any United States court shall find that a suit at law should have been brought in

equity or a suit in equity should have been brought at law, the court shall order any amendments to the pleadings which may be necessary to conform them to the proper practice. Any party to the suit shall have the right, at any stage of the cause, to amend his pleadings so as to obviate the objection that his suit was not brought on the right side of the court. The cause shall proceed and be determined upon such amended pleadings. All testimony taken before such amendment, if preserved, shall stand as testimony in the cause with like effect as if the pleadings had been originally in the amended form. (Title 28, sec. 397, U. S. C.)

Sec. 274B. In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal the appellate court shall have full power to render such judgment upon the record as law and justice shall require. (Title 28, sec. 398, U. S. C.)

Sec. 274C. Where, in any suit brought in or removed from any State court to any district of the United States, the jurisdiction of the district court is based upon the diverse citizenship of the parties, and such diverse citizenship in fact existed at the time the suit was brought or removed, though defectively alleged, either party may amend at any stage of the proceeding and in the appellate court upon such terms as the court may impose, so as to show on the record such diverse citizenship and jurisdiction, and thereupon such suit shall be proceeded with the same as

though the diverse citizenship had been fully and correctly pleaded at the inception of the suit, or, if it be a removed case, in the petition for removal. (Title 28, sec. 399, U. S. C.)

Sec. 274D. (1) In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings, to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court whether a general verdict be required or not.

EXHIBIT B.

CALENDAR No. 1067
73d CONGRESS
2nd Session

SENATE

REPORT No. 1005
DECLARATORY JUDGMENTS

May 10 (calendar day, May 14), 1934.—Ordered to be printed

MR. KING, from the Committee on the Judiciary, submitted the following

REPORT
(To accompany S. 588)

The Committee on the Judiciary, to whom was referred the bill (S. 588) to amend the Judicial Code by adding a new section, to be numbered 274D, having considered the same, report favorably thereon and recommend that the bill do pass with the following amendments:

On page 1, line 7, after the word "which" and before the word "the" add the words "at any time."

On page 2 strike out lines 17, 18, 19, and 20.

For a number of years measures providing for declaratory judgments have been before the House and the Senate.

On Friday, April 27, 1928, a subcommittee of the Judiciary Committee of the Senate held hearings on H. R. 5623 (70th Cong. 1st sess.) to amend the Judicial Code by adding a new section (274D) to authorize the Federal courts to

render declaratory judgments. This measure was with but a few verbal changes, the same as S. 588.

There appeared before the subcommittee as witnesses: Mr. Henry W. Taft, chairman of the committee on jurisprudence and law reform of the American Bar Association who appeared on behalf of the bill as representative of the American Bar Association; Mr. George E. Beers, of New Haven; Judge Jesse Miller, of Minnesota; Prof. Edwin M. Borchard, of the Yale Law School; and Prof. Edson R. Sunderland, of the Michigan Law School. All of these gentlemen, several of whom have studied the declaratory judgment procedure exhaustively, and have had practical experience with it, strongly approved the bill as constituting a valuable and effective aid in the administration of justice. There were also submitted to the subcommittee letters from Chief Judge Cardozo of the Court of Appeals of New York; Chief Justice von Moschzisker of the Supreme Court of Pennsylvania, and Judge Thomas W. Swan of the circuit court of appeals for the second circuit, all of whom approved the declaratory judgment procedure as a result of their practical experience. The testimony of the witnesses and the letters from the above-mentioned judges will be found printed in the hearings of the subcommittee. In those hearings will also be found an extended list of typical cases, in which the declaratory judgment has been invoked, prepared by Professor Borchard of Yale. His memorandum presents a survey of the practical operation of the procedure in the jurisdictions where it is now available.

NATURE OF THE DECLARATORY JUDGMENT.

The declaratory judgment differs in no essential respect from any other judgment except that it is not followed by a decree for damages, injunction, specific performance, or other immediately coercive decree. It declares conclusively and finally the rights of parties in litigations over a contested issue, a form of relief which often suffices to settle controversies and fully administer justice. It en-

ables parties in disputes over their rights over a contract, deed, lease, will, or any other written instrument to sue for a declaration of rights, without breach of the contract, etc., citing as defendants those who oppose their claims of right. It has been employed in State courts mainly for the construction of instruments of all kinds, for the determination of status in marital or domestic relations, for the determination of contested rights of property, real or personal, and for the declaration of rights contested under a statute or municipal ordinance, where it was not possible or necessary to obtain an injunction.

In the case of *Newsum* v. *Interstate Realty Co.* (152 Tenn. 302, 278 S. W. 56, 1925), the court stated:

> A declaratory judgment is essentially one of construction. It is apparent from the history of the legislation providing for this procedure, as well as from the recital of the Uniform Declaratory Judgments Act, that its primal purpose is the construction of definitely stated rights, status, and other legal relations, commonly expressed in written instruments, although not confined thereto.

The limitations and condition upon the rendering of such judgment are well stated in the case of *Braman* v. *Babcock* (98 Conn. 549, 120 Atl. 150, 1923), in which it was held that the Connecticut act, which closely resembles the proposed Federal act, authorizes—

> the superior court to render final judgments as to the existence or nonexistence of any right, power, privilege, or immunity, or of any facts upon which the existence or nonexistence of such right, power, privilege, or immunity may depend * * *. The party seeking such a judgment must have an interest, legal or equitable, by reason of danger of loss or of uncertainty as to his rights or other jural relations, and that there must be an actual bona fide and substantial question or issue in dispute, or substantial uncertainty of legal relations which require settlement between the parties; that all parties having an interest in the

> * * * complaint are parties to the proceeding, or have reasonable notice; and that the courts be of the opinion that the parties should not be left to seek redress in some other form of procedure, that issues of fact may be submitted to the jury, and that the decision of the court shall be final and subject to review by appeal.

The procedure has been especially useful in avoiding the necessity, now so often present, of having to act at one's peril or to act on one's own interpretation of his rights, or abandon one's rights because of a fear of incurring damages. So now it is often necessary, in the absence of the declaratory judgment procedure, to violate a statute in order to obtain a judicial determination of its meaning or validity. Compare *Shredded Wheat Co.* v. *City of Elgin* (284 Ill. 389, 120 N. E. 248, 1918), where the parties were denied an injunction against the enforcement of a municipal ordinance carrying a penalty, and were advised to purport to violate the statute and then their rights could be determined, with *Erwin Billiard Parlor* v. *Buckner* (156 Tenn. 278, 300 S. W. 565, 1927), where a declaratory judgment under such circumstances was issued and settled the controversy. So now it is often necessary to break a contract or a lease, or act upon one's own interpretation of his rights when disputed, in order to present to the court a justifiable controversy. In jurisdictions having the declaratory judgment procedure, it is not necessary to bring about such social and economic waste and destruction in order to obtain a determination of one's rights. There was filed with the committee and printed in the hearings a number of annotations from Carmody's New York practice act, in which the compiler undertook to compare the relief obtainable under the declaratory judgment procedure, without the necessity of prior breach, with the old practice of having first to break contracts or act on one's own interpretation in order to obtain a judicial determination. The comparison is enlightening. There seems little question that in many situations in the conduct of business serious disputes occur between parties,

where, if there were a possibility of obtaining a judicial declaration of rights in a formal action, much economic waste could be avoided and social peace promoted. Persons now often have to act at their peril, a danger which could be frequently avoided by the ability to sue for a declaratory judgment as to their rights or duties.

The fact is that the declaratory judgment has often proved so necessary that it has been employed under other names for years, and that in many cases the injunction procedure is abused in order to render what is in effect a declaratory judgment. For example, in the case of *Pierce* v. *Society of Sisters* (268 U. S. 510, 525, 45 Sup. Ct. 571, 1925), the court issued an injunction against the enforcement of an Oregon statute which was not to come into force until 2 years later; in rendering a judgment declaring the statute void, the court in effect issued a declaratory judgment by what was, in effect, apparently, an abuse of the injunction. See also *Village of Euclid* v. *Ambler Realty Co.* (272 U. S. 365, 47 Sup. Ct. 114, 1926). Much of the hostility to the extensive use of the injunction power by the Federal courts will be obviated by enabling the courts to render declaratory judgments.

An important practical advantage of the declaratory judgment lies in the fact that it enables litigants to narrow the issue, speed the decision, and settle the controversy before an accumulation of differences and hostility has engendered a wide and general conflict, involving numerous collateral issues. Some of the illustrations in Carmody's Annotations are in this respect enlightening.

Representative Ralph Gilbert in discussing this bill in the House of Representatives on January 25, 1928, described the declaratory judgment procedure as follows:

> You have the same court, the same jurisdiction, the same procedure, the same parties and the same question. Under the present law you take a step in the dark and then turn on the light to see if you have stepped into a hole. Under the declaratory judgment law you turn on the light and then take the step.

The report of the American Bar Association committee on noteworthy changes in the statute law, in September 1919, states:

> No more important statutes dealing with the administration of justice have been passed in recent years than those authorizing the courts to enter declaratory judgments determining rights and duties.

HISTORY.

The declaratory judgment has existed in Scotland for over 400 years, and in England since 1852. It is in force in Canada, in practically all the British dominions and colonies, in several of the countries of Latin America, and in Germany, Austria, and other continental countries. For us, the English practice is necessarily of greatest interest. In 1883 a rule of the Supreme Court of Judicature was adopted under which the declaratory judgment procedure in its present form was introduced. A simple rule of court sufficed to establish it in England. It is estimated that some 2,000 cases have been presented to the highest courts since 1883, and we are informed that the majority of the equity cases now coming up in England are proceedings for declaratory judgments. Order XXV, rule 5, of the Supreme Court Rules of 1883, reads:

> No action or proceeding shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and the court may make binding declarations of rights whether any consequential relief is or could be claimed, or not.

That rule furnishes the basis of S. 588 which provides that in cases within the jurisdiction of the Federal courts, those courts—

> shall have power to declare rights and other legal relations on request of any interested party for such declaration whether or not further relief is or could be prayed, and such declaration shall have the force of final decree and be reviewable as such.

Since 1919, 34 States and Territories of the Union have enacted the declaratory judgment statute. The movement for the adoption of these statutes has been particularly active since the adoption in 1921 by the commissioners on Uniform State Laws of the Uniform Declaratory Judgments Act. The States and Territories that now have such statutes are: Arizona, California, Colorado, Connecticut, Florida, Hawaii (Territory), Idaho, Indiana, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Philippines (Territory), Puerto Rico (Territory), Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Wisconsin and Wyoming.

Some 1,200 cases have arisen under these statutes, including 200 each reported in New York and Pennsylvania, covering almost every department of human activity. The statutes appear to have met with favor from the courts, and the subcommittee is impressed with the laudatory comments of lawyers and judges who have had actual experience with this procedure.

The fact is that the declaratory judgment in a limited form has been known to the common law, or under statute, for many years. The equitable actions for the removal of clouds from title, the action by a person in possession for the statutory period against a person claiming under a record title to have the latter's title declared void, actions impressing a trust on the legal title, actions to declare written instruments null, actions to construe wills, statutes authorizing judgments proving the tenor of lost instruments or proving the validity, when contested, of instruments to be recorded, and other illustrations that will readily occur to the lawyer are all cases in which declaratory judgments are rendered under other names. The decisions of the United States Court of Claims are essentially declaratory in nature, for they provide for no execution. The proposed section 274D would simply extend declaratory relief to other cases, provided the parties and subject matter are within the jurisdiction of the Federal

courts, in the same way that such relief has been extended in England and in the 34 States and Territories that now have such statutes in the United States. In principle, therefore, there is nothing novel about the procedure.

CONSTITUTIONALITY.

For some time doubts prevailed in certain courts, which assumed that the declaratory judgment had an analogy to advisory opinions. This confusion has now been dissipated. The declaratory judgment is a final, binding judgment between adversary parties and conclusively determines their rights. The Federal bill specifically provides for declaratory adjudication only "in cases of actual controversy." That precludes hypothetical, academic, or moot cases. The words "in cases of actual controversy" are designed to make certain what would be obvious even without them. The court has a discretion, now hardened into rule, not to issue the judgment if it will not finally settle the rights of the parties. The question of constitutionality has now been unanimously decided in 20 courts of the United States, Michigan having reversed its earlier opinion in which it was assumed that a declaratory judgment was an advisory opinion.

The United States Supreme Court, after some hesitation in dicta, finally had squarely to pass upon the matter and, in an exhaustive opinion, upheld the declaratory judgment as of the very essence of judicial power. In *Nashville, Chattanooga & St. Louis Ry. v. Wallace* (288 U. S. 249, 264, 53 Sup. Ct. 345, 1933), the Supreme Court has said:

> Hence, changes merely in the form or method of procedure by which Federal rights are brought to final adjudication in the State courts are not enough to preclude review of the adjudication by this Court, so long as the case retains the essentials of an adversary proceeding, involving a real, not a hypothetical, controversy, which is finally determined by the judgment below. (See *Old Colony Trust Co. v. Commissioner*, 279 U. S. 716, 724.) As the prayer for relief by in-

junction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with if, in other respects, the controversy presented is, as in this case, real and substantial.

The bill in its present form is a refinement as a result of years of consideration. The bill has passed the House of Representatives in four separate Congresses. Originally the bill had a fourth section providing that "the Supreme Court may adopt rules and regulations for carrying out the provisions of this act." Actually, however, there is no necessity for rules, for there is no material change in existing procedure, except that the prayer for relief in a petition or bill could under the proposed act request a declaration of rights, instead of or in addition to coercive relief in the form of damages, injunctions, specific performance, mandamus, etc. Some of the State statutes provide for court rules, partly because the courts in those States have rule-making power and partly because it was desired to make clear what could and could not be done under the action for declaratory judgments. For the most part these rules were a codification of existing decisions of the courts in England and the United States. The uniform act contains 16 sections, partly because many States do not accord their courts the rule-making power. There seems no need for such an extensive Federal bill; and while the procedure is neither distinctly in law nor in equity, but sui generis, the Supreme Court could probably at any time make rules under its equity power, if it saw fit.

Finally, it may be said that the declaratory-judgment procedure has been molded and settled by thousands of precedents, so that the administration of the law has been definitely clarified. The Supreme Court mentioned one of its principal purposes in *Terrace v. Thompson,* (263 U. S. 197, 216, 44 Sup. Ct. 15, 1923), by Butler, J., when it said:

> They are not obliged to take the risk of prosecution, fines, and imprisonment and loss of property in order to secure an adjudication of their rights.

Exhibit B.

The 1,200 American decisions have established that the proceeding must be adversary, all interested parties must be cited, the issue must be real, the question practical and not academic, and the decision must finally settle and determine the controversy. It enables disputes arising out of written instruments, or otherwise, to be adjudicated without requiring a destruction of the status quo and of the social and economic fabric. Experience has shown that a dispute can be adjudicated as effectively, if not more usefully, before the status quo has been destroyed.

The long history of the procedure in England, and for some 15 years in the United States, encourages the committee to believe that the new section of the Judicial Code will be an important aid in the administration of justice.

EXHIBIT C.

EXTRACTS FROM "DECLARATORY JUDGMENTS" BY EDWIN BORCHARD, HOTCHKISS, PROFESSOR OF LAW, YALE UNIVERSITY; CO-DRAFTSMAN OF THE DECLARATORY JUDGMENT ACT (CONGRESSIONAL RECORD, PAGE 2027, 70TH CONGRESS, 1ST SESSION).

"The fact, however, that no coercive decree is sought or is attached to the judgment enables actions to be brought for a declaratory judgment on two different types of operative facts: (a) those which might also have justified an action for an executory (coercive) judgment or decree, or (b) those which are not susceptible of any other relief.

"It is this latter class of cases which in the main has caused occasional difficulty in the courts and which at the same time exemplifies some of the striking economic and social advantages of the procedure directed to a declaratory judgment. Whereas in the former class of cases—where an action for execution might have lain—the action for a judicial declaration is an alternative remedy, in the latter class it is an exclusive remedy. The distinctive features of this second group is that no 'injury' or 'wrong' need have been actually committed or threatened in order to enable the plaintiff to invoke the judicial process; he need merely show that some legal interest or right of his has been placed in jeopardy or grave uncertainty, by denial, by the existence of a potentially injurious instrument, by some unforeseen event or catastrophe the effect of which gives rise to dispute, or by the assertion of a conflicting claim by the defendant, e.g., that the plaintiff claims she is the defendant's wife, which defendant denies; that the defendant public official demands certain tax information, from the exaction of which plaintiff claims immunity; that defendant lessee demands the erection of a three-story fireproof building under a lease (the old non-fireproof one having burned), whereas plaintiff lessor maintains he is privi-

leged to erect a two-story building, the new statutory limit for garages; that a state statute requires a heavy license fee from billiard parlors in one county only, whereas plaintiff asserts his immunity therefrom on the ground of unconstitutionality; that plaintiff is not under a duty to return to defendant certain moneys paid by defendant on forged bills of lading; that defendant asserts plaintiff is bound to perform a contract for a future period, whereas plaintiff maintains he is not so bound; that plaintiff claims in 1915 that he is no longer bound to perform certain long-term contracts to deliver iron ore to the defendant from 1911 to 1919, on the ground that the war has abrogated the contracts; that the plaintiff debtor is privileged to repay the defendant creditor in Russian rubles instead of British pounds and thereupon recover the pledged security; that certain buildings are 'temporary', within the meaning of a statute, and that plaintiff public officials are privileged to tear them down as such.

"In these typical cases, no wrong or even hostile activity has been committed or threatened—a condition, it may be observed, which justified judicial relief in various equitable actions long before declaratory actions and judgments were eo nomine specifically authorized. What is visible in this type of case is the existence of an opposing claim which disturbs the peace and freedom of the plaintiff and, by raising doubt, insecurity, and uncertainty in his legal relations, impairs or jeopardizes his pecuniary or other interests. Jurisdictions authorizing the procedure for a declaratory judgment recognize that these interests are sufficiently important to warrant legal and judicial protection; those not authorizing the procedure have apparently not yet become aware either of the interest in question or of the social need of protecting them. A survey of some of the cases that have been decided under this procedure discloses it as an essential means of bringing to judicial cognizance many important legal issues and of settling legal controversies promptly and efficiently before violence or hostile action has caused irreparable injury. This is especially true in the matter of long-term contracts, the execution of which is affected by all sorts of new legislation

and events incidental to a period of rapid change. It should be unnecessary for either party to breach the contract or act on his own interpretation of its meaning or of the effect of new events, and incur the risk of breach, forfeiture, and damages, as a prerequisite to bringing the contract to judicial cognizance for construction and interpretation. The dispute having arisen, either party, before and without breach, should be able to summon the other party to court and obtain judgment. Acting at one's peril to break the deadlock should become less necessary as time goes on. Most civilized jurisdictions recognize this interest in security and certainty and afford it judicial protection on evidence of dispute or contest, if a useful purpose is thereby served. Some have not yet appreciated its importance. But thousands of cases in nearly every country of Europe, America, and Asia attest the social value of construing and interpreting written instruments and determining and settling legal relations of all kinds on proof of controversy or dispute, in the realization that social waste and disturbance are thereby avoided and private and public security promoted." (pages 24-26).

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"*Justiciability.* Justiciability is the necessary condition of judicial relief. It is that which the term 'case' or 'controversy' is designed to insure, and the Supreme Court has had frequent occasion to consider the matter. So have the courts of foreign countries. What, then, are the 'necessary features' of justiciability? While state courts occasionally assume legislative and executive functions which could not be imposed on federal courts, the power to determine contested rights is a traditional function of all judicial courts in the western world. Expediency and the relative danger of conflict with other departments of the government have induced a refusal to decide major political questions or review mere administrative findings. Expediency and a desire not to function in the abstract, but to decide only concrete contested issues conclusively affecting adversary parties in interest, have induced a refusal to render advisory opinions or decide moot cases. Actions or opinions are denominated 'advisory', when there is an insufficient

interest in the plaintiff or defendant to justify judicial determination, where the judgment sought would not constitute specific relief to a litigant or affect legal relations or where, by reason of inadequacy of parties defendant, the judgment could not be sufficiently conclusive. Actions or opinions are described as 'moot' when they are or have become fictitious, colorable, hypothetical, academic, or dead. The distinguishing characteristics of such issues is that they involve no actual, genuine, live controversy, the decision of which can definitely affect existing legal relations. The issue is either not yet ripe for determination, because no opposing claim or right has yet been asserted or advanced or has arisen and hence no actual or potential conflict can be established, or else the issue has ceased to be live or practical, because the facts have changed, either by settlement of the controversy or by alteration in the circumstances of the parties or subject-matter, so as to make the judgment not decisive or controlling of actual and contested rights, but a pronouncement having academic interest only. Such issues cannot be determined by declaratory judgment any more than by another judgment.

" 'The fact that the plaintiff's desires are thwarted by its own doubts, or by the fears of others', may or may not describe a hypothetical or moot case, depending on the circumstances. In bills of peace, quia timet, to quiet title, of interpleader, and other equitable proceedings, in actions to declare transactions (such as marriages) or instruments (such as bonds or deeds or titles) or privileges and powers (such as sale) valid or void, the plaintiff's action may be motivated by his own doubts or the denial or fears of third parties as to his right or title, but there is no justiciable issue until he translates his doubt into a claim of right and asserts it against a defendant having an interest in contesting it. When that happens, it is a justiciable controversy, regardless of its origin in the plaintiff's own doubts or the fears of others, and regardless of the form of action, declaratory or executory, in which the issue is presented. The question is, whether the plaintiff has a sufficient interest to warrant judicial protection." (pages 29-32.)

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"As already observed, such a criterion would make it apparent that a debtor has as much interest in denying the unfounded demand of his creditor as the creditor has in asserting his claim against the debtor. The defeat of an unfounded claim which disturbs or renders insecure a person's rights is as much an interest capable and in need of protection as the assertion of the claim itself. The assertion of the plaintiff's privilege or lack of duty, of his immunity or lack of liability, when demands are extrajudicially or judicially made upon him, are as much interests worthy of judicial protection as the claim of plaintiff's rights and powers or of defendant's duties and liabilities. The great advantage of the declaratory judgment is that it enables the point in dispute to be raised at the inception of the controversy, before damage has been done by acting upon one's own view of his rights, and that it enables the issue to be narrowed within the strictest limits." (page 39.)

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"When are the facts contingent? That is not always easy to determine. The Pennsylvania Supreme Court in an exhaustive opinion which has been followed extensively, laid down the rule that the court must be

> 'satisfied that an actual controversy, or the ripening seeds of one, exists between parties, all of whom are sui juris and before the court, and that the declaration sought will be a practical help in ending the controversy.'

"By 'ripening seeds' the court meant, not that sufficient accrued facts may be dispensed with, but that a dispute may be tried at its inception before it has accumulated the asperity, distemper, animosity, passion, and violence of the full-blown battle which looms ahead. It describes a state of facts indicating 'imminent' and 'inevitable' litigation. The dispute may by declaration be determined before the status quo has been altered by physical acts of either party.

"And yet, distinctions are here important. When a tenant contends that he is privileged to tear down a leased building and the landlord denies that privilege, material interests being at stake, the controversy is real and actual, and not hypothetical, though the building has not yet been

touched. When two persons in interest dispute as to their right to property, to public office, to a right of way, to a personal status, to a lien, to a privilege to act under an existing instrument or law, to immunity from adverse claims, the controversy is actual and fully matured, although no violence or trespass has yet been committed by either party. Such controversies are 'ripe' for decision, as soon as the court is convinced that the antagonism is genuine and that the court's judgment will conclusively determine the issues involved. Perhaps the principal contribution that the declaratory judgment has made to the philosophy of procedure is to make it clear that a controversy as to legal rights is as fully determinable before as it is after one or the other party has acted on his own view of his rights and perhaps irretrievably shattered the status quo. Such violence and destruction make the issue more painful and socially undesirable, but they do not make it any more controversial. The controversy was ripe for decision before the violence and destruction had begun. Once this fact becomes clear, the value of the declaratory judgment will be even more generally recognized. For, as Congressman Gilbert remarked in the debate on the first federal declaratory judgments bill,

> 'Under the present law you take a step in the dark and then turn on the light to see if you stepped in a hole. Under the declaratory judgment law you turn on the light and then take step'." (pages 41-42.)

* * * * *

"When a person shows that he is able and ready to perform a certain act, e.g., to pay off a mortgage or lien or pay it in a certain way, and the dispute turns on his privilege so to do, the issue is ripe for decision, although the payment has not yet been made. The imminence and practical certainty of the act or event in issue, or the intent, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, contingent, and uncertain events that may never happen and upon which it would be improper to pass as operative facts." (pages 43-44.)

* * * * *

"The defendant's acts must be sufficiently definite and final to constitute a genuine threat to the plaintiff's peace of mind or pecuniary interests. When that time has come is again not always easy to state. The enactment of a statute providing for the taxation of property deemed tax-exempt places an affected plaintiff in gear to claim immunity. So, a plaintiff contesting the applicability or validity of restrictive regulations under the police power need do no more than show that they in some way affect him deleteriously. But until the statute or ordinance is passed, the claim of privilege or immunity would be premature. Where the immunity is claimed against administrative action, rather than against a statute as such, there must be some evidence that the administrative action is threatened. Prior to that time, protest would usually be deemed premature. Plans for acts initiated by a defendant in a position to harm the plaintiff may, if deemed serious and inevitable, constitute a threat sufficient to start proceedings. In these cases, the court must merely be convinced that the plan is sufficiently ripe to justify the plaintiff's fears of injury and the court's interference by adjudication.

"In many cases a denial or challenge of the plaintiff's rights by a qualified person creates a legal interest in judicial relief. In other cases, a more definite threat of injury to the plaintiff may be necessary, for example, the assertion of a cloud on his right or title. If a cloud is not dissipated, it will reduce the value of the plaintiff's land or impair other privileges, wherefor allegation or proof of the existence of the cloud creates justiciability.

"The danger of a criminal penalty attached by law to the performance of an act affords those affected the necessary legal interest in a judgment raising the issue of validity, immunity, or status. The threat to enforce the statute seems hardly necessary, for public officials are presumed to do their duty. The plaintiff need only show that his position is jeopardized by the statute." (pages 45-47.)